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In the

UNITED STATES SUPREME COURT

October Term, 1940

No. 959

PHIL CHADWICK, ET AL, *Petitioners*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

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No. .....

PHIL CHADWICK, ET AL, *Petitioners*

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Come now Petitioners Phil Chadwick, Mrs. Phil Chadwick, Abe Chapman and Charley Schiffman, Appellants below, and petitioning for Writ of Ceritorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully show:

STATEMENT OF THE CASE

When this case was called for trial Abe Chapman and Charles Schiffman were brought in from the penitentiary for trial, and not having been able to secure a lawyer the Honorable Maxwell Shapiro and Howard

Dailey were appointed to represent these petitioners. That thereafter Phil Chadwick and Mrs. Phil Chadwick presented their petitions to the United States Circuit Court of Appeals for the Fifth Circuit stating that they had exhausted their abilities to further prosecute their appeal and the United States Circuit Court of Appeals issued its order allowing them to proceed in forma pauperis. Therefore, this record is presented in forma pauperis.

On the 14th day of May, 1940, in Cause No. 7486-Criminal, there was returned into the United States District Court for the Northern District of Texas, at Ft. Worth, an indictment in 42 counts, against Louis Sherman, Emanuel Weiss, Charles Schiffman, Jack Leftak Moe Liss, B. Cooper, H. Grossberg, S. Dubinbaun, Abe Chapman, James Russo, Phil Chadwick, Mrs. Phil Chadwick, Nelson Harris, Jesse Harris, B. H. Schaffer, Bert Barkley, Glenn Cox, Charlie Beland, Dewey Ross, Marie Ross, Cliff Green, Henry Moore, Tommy Stobble, Albert Goldstein, George Taylor, Arthur C. Roberts, Charles Bernardi, Jerry Seigle, and Jacob Roamer.

The first 41 counts charged the defendants and each of them, with having violated certain provisions of the Harrison Anti Narcotic Act, and of the Drug Import and Export Act, and the 42nd count charged each of them with having conspired to so violate said provisions. The indictment also charged 92 overt acts done by the defendants in furtherance of the object of said conspiracy.

The defendants, Glenn Cox, Dewey Ross, Marie Ross, and Albert Goldstein, when called for arraignment, entered their pleas of guilty; that Tommy Stobble entered a plea of guilty to count 42, and not guilty as to counts 1 to 41, inclusive, and the rest of the defendants present for trial entered their pleas of not guilty; that thereafter, the defendants Cliff Green and Jacob Roamer withdrew their pleas of not guilty to Count 42 and entered thereto a plea of guilty, and not guilty as to counts 1 to 41, inclusive.

The defendants Emanuel Weiss, B. Cooper, H. Grossberg, S. Dubinbaun, James Russo, and Jerry Seigle were not present for trial, and the trial proceeded as to the remainder of the defendants.

That on the 17th day of July, 1940, at the conclusion of the trial, the jury found the defendants Glenn Cox, Dewey Ross, Marie Ross, and Albert Goldstein guilty as charged in the indictment, and as pleaded by them; that Louis Sherman was found not guilty; that Charles Schiffman was found guilty in counts 1 to 6, inclusive, and count 42; that Jack Leftak was found not guilty as charged in counts 1 to 10, inclusive, and guilty in count 42; that Moe Liss, alias Tommy Cooper, was found guilty in counts 1 to 10, inclusive, and count 42, and not guilty as charged in counts 11 to 41, inclusive; that Abe Chapman was found not guilty as charged in counts 11 to 41, inclusive, guilty in counts 1 to 6, inclusive, and count 42; that Phil Chadwick was

found not guilty in counts 1 to 6, inclusive, and guilty in counts 7 to 42; that Mrs. Phil Chadwick was found not guilty as charged in counts 1 to 6, inclusive, and guilty in counts 7 to 42; that Nelson Harris was found not guilty as charged in counts 1 to 10, inclusive, and counts 38 to 41, inclusive, and guilty of count 42; that the defendant Jesse Harris was found not guilty; that the defendant, B. H. Schaffer was found not guilty as charged in counts 1 to 10, inclusive, and guilty in count 42; that Bert Barkley was found guilty in count 42; that Charlie Beland was found guilty in counts 16-18-42; that Cliff Green was found not guilty as charged in counts 1 to 41, inclusive, and guilty as charged in count 42; that Henry Moore was found not guilty in counts 1 to 10, inclusive, and found guilty in count 42; that Tommy Stobble was found not guilty as charged in counts 1 to 10, inclusive, and guilty in count 42; that George Taylor was found guilty in count 42; that Arthur C. Roberts was found guilty in count 42; that Jacob Roamer was found not guilty as charged in counts 1 to 41, inclusive, and guilty of count 42.

That the findings of the jury was silent as to their disposition of the various counts against the defendants not named in their verdict, as above set out; that Charlie Beland was sentenced to serve 5 years, generally, on counts 16 to 42, and for a period of 10 years on count 18, five years to be served, and the ten years to be suspended on count 18; that Phil Chadwick was sentenced to serve 12 years, generally, in the United

States Penitentiary at Leavenworth, Kansas; that Mrs. Phil Chadwick was sentenced to serve 2 years in the woman's reformatory at Alderson, West Virginia, on count 42, and 5 years, generally, on counts 7 to 41, inclusive, and the execution of said sentence on counts 7 to 41, inclusive, was suspended by allowing the defendant to be placed on probation for 5 years after execution of sentence on count 42; that Abe Chapman was sentenced to serve 8 years in the United States Penitentiary, at Leavenworth, Kansas, generally, on counts 1 to 6, inclusive, and for 2 years on count 42, which said sentence on count 42 was to be suspended for 5 years, after the execution of the sentence imposed on counts 1 to 6; that Charles Schiffman was sentenced to serve 10 years, generally, and to be served consecutively with any other sentence.

That in due course, the defendants, Phil Chadwick, Mrs. Phil Chadwick, Abe Chapman, Charles Schiffman, Charlie Beland, and Bert Barkley filed their notice of appeal, and thereafter perfected such appeal to the United States Circuit Court of Appeals.

That prior to the arraignment of your petitioners they and each of them filed their General Demurrer and Motion to Quash (Tr. 63); that this General Demurrer and Motion to Quash having been overruled, they then filed Petition for Severance (Tr. 64); the General Demurrer and Motion to Quash and Petition for Severance having been overruled they filed their

petition to require the United States District Attorney to elect upon which count, or counts, he would prosecute each of your petititoners (Tr. 66), which said petition was also overruled by the Court.

The United States Circuit Court of Appeals for the Fifth Circuit on the 18th day of February, 1941, after the case had been duly appealed, briefs filed, arguments made, affirmed the decision of the Court below, except as to Beeland and Barkley. The opinion of the Court in affirming the case as to these petitioners appears Tr. 931. They then duly filed their petition for rehearing on March 18, 1941, which was by said Honorable Circuit Court of Appeals overruled the 20th day of March, 1941, without written opinion.

STATEMENT AS TO JURISDICTION

Jurisdiction of this case is conferred upon the Supreme Court by Section 347a U.S.C.A., Title 28. The opinion of the Circuit Court of Appeals appears Tr. 931.

QUESTIONS PRESENTED

1. *Whether the trial court erred in overruling appellants' general demurrer and motion to quash the indictment on the ground that there was a fatal misjoinder of persons and offenses.*

This was assigned as error below (Tr. 63).

2. *Whether the trial court erred, after the general demurrer and motion to quash seasonably filed and presented, was overruled, in failing and refusing to grant to petitioners and each of them, a severance.*

This was urged as error below (Tr. 64).

3. *Whether the trial court erred, after the general demurrer and motion to quash, and petition for severance had been overruled, in failing and refusing to require the United States District Attorney to elect upon which count, or counts, he would prosecute each of your petitioners.*

This was urged as error below (Tr. 66).

4. *Whether the trial court erred in failing and refusing to sustain your petitioners' motion for a mistrial because of the prejudicial and inflammatory remarks made by the United States District Attorney in his address to the jury, duly and seasonably made at the time the remarks were so made by the said The United States District Attorney* (Tr. 956-957), *which was urged as error below.*

5. These petitioners urged in their appeal to the United States Circuit Court of Appeals for the Fifth Circuit eleven propositions of error, which they here now urge as grounds for this petition, supplemental and in addition to the questions above set out, as follows:

PROPOSITION 1.

Where an indictment, containing 42 counts, naming 29 defendants living in various parts of the United States, alleging that some of the offenses were committed in one state, and some in another, it is not within the sound discretion of the Court to refuse to order the United States District Attorney to furnish the defendants a bill of particulars as to just what each of their connections were with the substantive offenses alleged, although the indictment contained one count of a general conspiracy. (Assignment of errors No. 1.)

PROPOSITION 2.

Although when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, yet 29 defendants, operating in several separate and distinct parts of the United States, committing different crimes, separate and distinct, complete in themselves, in no way connected with offenses committed by the others, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, cannot be joined in the same indictment. (As-

signments of errors Nos. 2, 3, 4, 6, 7, 8, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and 32.)

PROPOSITION 3.

Where a defendant is on trial for a crime, and does not take the stand in his own behalf, or for another, and does not, by testimony offered, place his reputation in issue, it is prejudicial error to either offer testimony as to the bad character or reputation of that defendant, or for the prosecuting attorney, in the presence of the jury, to charge that defendant with a bad reputation, or to refer to the fact of his incarceration in prison. (Assignments of errors Nos. 11, 12, and 18.)

PROPOSITION 4.

Where a defendant has been indicted and is on trial for a certain crime, it is prejudicial error for the Government to offer proof tending to show that he is probably guilty of other, separate, distinct, and extraneous crimes. (Assignments of error Nos. 13, and 15.)

PROPOSITION 5.

Where testimony is offered, or remarks made in the presence and hearing of the jury by the prosecuting attorney, of such inflammatory nature as would be calculated to inflame the minds of the jury, create resentment, or unduly prejudice the minds of such jury

against defendants on trial, it is such prejudicial error that might not likely be erased from the minds of the jury by the instructions of the Court to disregard same. (Assignments of error Nos. 13, 15, 29, 34, and 35.)

PROPOSITION 6.

Where several defendants are on trial for a crime, and do not take the witness stand in their own behalf, it is error for the Court, without request of the defendants, to charge the jury on such failure of defendants to testify, because it unduly emphasizes such fact, and is calculated to lead the jury to believe such defendants are guilty because they did not deny their guilt as witnesses. (Assignment of error No. 9.)

PROPOSITION 7.

While appellants concede that where a conspiracy has been charged in an indictment against several defendants, and it has been proved by the evidence beyond a reasonable doubt, the acts and transactions of one so charged, in furtherance of this conspiracy, becomes the acts and transactions of the others, yet it is error for the Court to fail and refuse to charge that such acts or transactions by one conspirator cannot become the acts or transactions of the others unless and until the jury finds and believes, from the evidence, beyond a reasonable doubt that such others were members of the same conspiracy, as the declarator or actor,

and that such acts or transactions were in furtherance of the object of the conspiracy. (Assignment of error No. 36.)

PROPOSITION 8.

Where several defendants are on trial for a crime, under an indictment charging one count of general conspiracy, and 41 substantive offenses, and it develops upon the trial of this case that there was a fatal misjoinder of persons and offenses, and that the proof did not sustain the indictment as alleged, it was error for the Court to fail and refuse to instruct a verdict of not guilty. (Assignment of Error same as under Proposition No. 2, and Assignment of Error No. 37.)

PROPOSITION 9.

Where a verdict of the jury is returned into Court upon an indictment containing several counts, and that verdict is so vague, indefinite, incomplete that it does not dispose of such issues in the indictment, upon which a plea of former jeopardy may be predicated, it is fatal error for the Court to fail and refuse to sustain appellants' motion in arrest of judgment. (Assignments of Error Nos. 2, 3, 4, 6, 7, 8, and 38.)

PROPOSITION 10.

A Sentence of the Court cannot be based on a count of an indictment where the jury's verdict does not

specifically include such count in its finding of guilt. (Assignment of Error No. 39.)

PROPOSITION 11.

Where a certain letter alleged to have been written by a defendant on trial for a crime, and containing certain admissions tending to establish his guilt, is admitted into evidence, it is prejudicial error to allow the United States District Attorney to display before the jury genuine specimen of that defendant's handwriting, enlarged to the proportion of six to one for the use of a handwriting expert, as tending to overly emphasize the importance of the letter. (Assignment of Error No. 33.)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. In holding that Petitioners' aassignment of error as to the action of the trial court in overruling their general demurrer and motion to quash, petition for severance, and petition for order requiring the United States District Attorney to elect upon which count, or counts he would prosecute each of your petitioners did not adversely affect a substantial right of your petitioners, is in conflict with the well settled decisions of this the Honorable United States Supreme Court and particularly in conflict with McElroy v. U. S., 164 U. S. 76, 41 L. Ed. 355, followed and supported also by:

Coco v. U. S., 198 Fed. 289, Fed. 33;

Wyatt, et al v. U. S., 23 F. (2d) 791; 227 U. S. 588, 72 L. Ed. 1002;

L. Rosa, et al v. U. S., 15 Fed. (2d) 749;

Edenfield, 8 Fed. (2d) 614 (reversed), 273 U. S. 660; 71 L. Ed. 827;

De' Luca v. U. S., 298 Fed. 412;

Vaccaro v. U. S., 30 Fed. (2d) 678.

2. In holding that an instruction by the trial court to disregard the inflammatory argument made by the United States District Attorney cured whatever error that might have been committed, is in conflict with the well settled decisions of all the Courts, including this Honorable Court, and particularly with the doctrine announced in Ruling Case Law, Vol. 22, page 12, and the decisions cited thereunder; also in conflict with the doctrine set out in 2 Ruling Case Law, Page 35, and the decisions thereunder cited, and particularly holding that where such remarks of the United States District Attorney are of such inflammatory nature as the harmful results of such remarks might not likely be cured by the instructions of the Court to the jury to disregard same, conviction will be set aside regardless of such instructions of the trial court.

3. Whether, as to Mrs. Phil Chadwick, the finding by the jury of guilty "from counts 7 to 42" amounted to finding her guilty on count 42 (Tr. 979).

Attorney for Petitioners.

In the

UNITED STATES SUPREME COURT

October Term, 1941

No. .....

PHIL CHADWICK, ET AL, *Petitioners*

vs.

UNITED STATES OF AMERICA

SUPPORTING BRIEF

To the Honorable the Supreme Court of the United States:

In support of their petition for Writ of Certiorari the Petitioners respectfully show to the Court:

I.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals in this case has not yet been reported, but it appears in the record at page 931.

II.

JURISDICTION

(a) The opinion below was handed down on February 18, 1941; petition for Rehearing was denied on March 20, 1941.

(b) This Court has jurisdiction under 28 U.S.C.A., 347 (a). The jurisdiction of this Court is invoked upon the following ground:

1. In overruling Appellants' General Demurrer and Motion to Quash, their Petition for Severance, and Petition to require the United States District Attorney to elect upon which count, or counts he would prosecute each of these petitioners, the United States Circuit Court of Appeals for the Fifth Circuit decided an important question in the administration of Federal criminal justice in a way in conflict with the applicable decisions of the Supreme and particularly in conflict with the decision in McElroy v. U. S., 164 U. S. 76; 41 L. Ed. 355.

2. In holding that a mere instruction of the trial court to the jury to disregard certain inflammatory remarks made by the United States District Attorney in the presence and hearing of the jury, cured whatever error might have been committed, the United States Circuit Court of Appeals for the Fifth Circuit decided a question in conflict with the well settled rulings announced by this Court.

3. In holding that the liberal construction of the jury's verdict meant that Mrs. Phil Chadwick was found guilty on Count 42 of the indictment, upon which she was sentenced to serve two years in the United States Reformatory at Alderson, West Virginia, the United States Circuit Court of Appeals reversed the presumption of innocence that necessarily attaches in the trial of a criminal case.

III.

STATEMENT OF THE CASE

Before the arraignment of your petitioners in the Trial Court below, they and each of them filed their general demurrer and motion to quash the indictment on the ground that there was a fatal misjoinder of persons and offenses; this being overruled they then filed petition for severance and separate trials; this being overruled they filed their motion requiring the United States District Attorney to elect upon which count or counts he would prosecute each of them, which said petition was also overruled by the Court.

It will be noted in each of these motions that these petitioners set out in detail the counts upon which the Government would be able to offer no substantial proof to connect them with the particular offenses alleged (Tr. 63 to 66).

Petitioner Mrs. Phil Chadwick, in her Assignment of Error Number 39 (Tr. 979) urged to the United States

Circuit Court of Appeals that she was not found guilty on the count upon which she was sentenced to serve two years in Alderson, West Virginia, but the Circuit Court of Appeals in its opinion held that the liberal construction of the jury's verdict was that she was found guilty upon said Count 42.

MISJOINDER

The only substantial evidence offered by the Government to connect all of these petitioners with the transactions alleged in the various counts of the indictment was that the narcotics at issue come from a common source. They attempted to establish a conspiracy, connecting all the petitioners with the transactions alleged in the indictment by showing that they purchased these narcotics for resale from a common source, and this Court has always held that a buyer and seller of narcotics cannot be guilty of conspiracy.

IV.

SPECIFICATIONS OF ERROR

PROPOSITION 1.

Where an indictment, containing 42 counts, naming 29 defendants living in various parts of the United States, alleging that some of the offenses were committed in one state, and some in another, it is not within the sound discretion of the Court to refuse to

order the United States District Attorney to furnish the defendants a bill of particulars as to just what each of their connections were with the substantive offenses alleged, although the indictment contained one count of a general conspiracy. (Assignment of errors No. 1.)

PROPOSITION 2.

Although when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, yet 29 defendants, operating in several separate and distinct parts of the United States, committing different crimes, separate and distinct, complete in themselves, in no way connected with offenses committed by the others, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, cannot be joined in the same indictment. (Assignments of errors Nos. 2, 3, 4, 6, 7, 8, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and 32.)

PROPOSITION 3.

Where a defendant is on trial for a crime, and does not take the stand in his own behalf, or for another, and does not, by testimony offered, place his reputation in issue, it is prejudicial error to either offer testimony as to the bad character or reputation of that defendant, or for the prosecuting attorney, in the presence of the jury, charge that defendant with a bad reputation, or to refer to the fact of his incarceration in prison. (Assignments of error Nos. 11, 12, and 18.)

PROPOSITION 4.

Where a defendant has been indicted and is on trial for a certain crime, it is prejudicial error for the Government to offer proof tending to show that he is probably guilty of other, separate, distinct, and extraneous crimes. (Assignments of errors Nos. 13, and 15.)

PROPOSITION 5.

Where testimony is offered, or remarks made in the presence and hearing of the jury by the prosecuting attorney, of such inflammatory nature as would be calculated to inflame the minds of the jury, created resentment, or unduly prejudice the minds of such jury against defendants on trial, it is such prejudicial error that might not likely be erased from the minds of the jury by the instructions of the Court to disregard same. (Assignments of error Nos. 13, 15, 29, 34 and 35.)

PROPOSITION 6.

Where several defendants are on trial for a crime, and do not take the witness stand in their own behalf, it is error for the Court, without request of the defendants, to charge the jury on such failure of defendants to testify, because it unduly emphasizes such fact, and is calculated to lead the jury to believe such defendants are guilty because they did not deny their guilt as witnesses. (Assignment of error No. 9.)

PROPOSITION 7.

While appellants conceded that where a conspiracy has been charged in an indictment against several defendants and it has been proved by the evidence beyond a reasonable doubt, the acts and transactions of one so charged, in furtherance of this conspiracy, becomes the acts and transactions of the others, yet it is error for the Court to fail and refuse to charge that such acts or transactions by one conspirator cannot become the acts or transactions of the others unless and until the jury finds and believes, from the evidence, beyond a reasonable doubt that such others were members of the same conspiracy, as the declarator or actor, and that such acts or transactions were in furtherance of the object of the conspiracy. (Assignment of error No. 36.)

PROPOSITION 8.

Where several defendants are on trial for a crime, under an indictment charging one count of general conspiracy, and 41 substantive offenses, and it develops upon the trial of this case that there was a fatal misjoinder of persons and offenses, and that the proof did not sustain the indictment as alleged, it was error for the Court to fail and refuse to instruct a verdict of not guilty. (Assignment of Error same as under Proposition No. 2, and Assignment of Error No. 37.)

PROPOSITION 9.

Where a verdict of the jury is returned into Court upon an indictment containing several counts, and that verdict is so vague, indefinite, incomplete that it does not dispose if such issues in the indictment, upon which a plea of former jeopardy may be predicated, it is fatal error for the Court to fail and refuse to sustain appellants' motion in arrest of judgment. (Assignments of Error Nos. 2, 3, 4, 6, 7, 8, and 38.)

PROPOSITION 10.

A Sentence of the Court cannot be based on a count of an indictment where the jury's verdict does not specifically include such count in its finding of guilt. (Assignment of Error No. 39.)

PROPOSITION 11.

Where a certain letter alleged to have been written by a defendant on trial for a crime, and containing certain admissions tending to establish his guilt, is admitted into evidence, it is prejudicial error to allow the United States District Attorney to display before the jury genuine specimen of that defendant's handwriting, enlarged to the proportion of six to one for the use of a handwriting expert, as tending to overly emphasize the importance of the letter. (Assignment of Error No. 33.)

V.

BRIEF OF THE ARGUMENT

Under Proposition Number One

The appellants recognize that it is fairly well settled that the failure of the Court to order the United States District Attorney to furnish a bill of particulars is, as a general rule, within the sound discretion of the trial court, but in the instant case, these appellants feel that where the indictment of 42 counts, charging each and every one of 29 defendants with the commission of each and every offense alleged in the indictment, and it appearing that some of these defendants lived in New Orleans, some in New York, others in Chicago, Dallas, and Ft. Worth, many of them not having been acquainted with each other, it was impossible for each of the defendants to be responsible

for, or know, what the others were doing, and what offenses tehy were committing. Without th einformation sought by them, they were confounded in their defense, were unable to prepare to meet the proof offered by the Government, and were so prejudiced in the preparation and presentation of their defense to such an extent that the failure to order the United States District Attorney to furnish said bill of particulars was not within the sound discretion of the Court.

Under Propositions Number Two and Eight

These appellants recognize that where there are several charges against several persons for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be *properly joined*, instead of having several indictments, the whole may be joined in one indictment in separate counts, but there is no authority to join 29 defendants in one indictment, who, if guilty at all, were guilty of the commission of separate and distinct offenses, not connected together, independent, complete in themselves, not provable by the same set of facts or circumstances, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, and to do so confounds them, and each of them, in their defense, brands them, and each of them, as habitual criminals in the eyes of the jury, and high-

ly prejudicial to the rights of such defendants so joined together, as was done in this case.

That the appellants, Phil Chadwick and Mrs. Phil Chadwick, on the 28th day of June, 1940, and before they entered their pleas to the indictment, filed their general demurrer and motion to quash the indictment returned herein, on the ground that there was a fatal misjoiner of persons and offenses in said indictment, and at the time this case was called for trial, the Court appointed Howard Dailey, who was representing Phil Chadwick and Mrs. Phil Chadwick, to represent Abe Chapman, Charles Schiffman, and Tommy Cooper, who were brought from the penitentiary for this trial, and who were not represented by counsel, and did not have money with which to hire one. The Court allowed the defendants, Cooper, Chapman, and Schiffman to adopt and avail themselves of any and all motions filed by Mr. and Mrs. Phil Chadwick.

The appellants, Phil Chadwick and Mrs. Phil Chadwick, alleged in their general demurrer and motion to quash that the Government would be able to offer no substantial proof tending to connect them with Counts 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, or 42 of said indictment. (Tr. p. 65). This general demurrer and motion to quash was by the Court overruled.

That they also duly and seasonably filed their petition for severance, alleging that they were so misjoined, and that the Government would be able to offer no substantial proof tending to connect them with the counts above enumerated, which was also overruled by the Court. (T. p. 64).

That after the Court had overruled their said general demurrer and motion to quash, and petition for severance, they duly and seasonably filed their petition for an order requiring the United States District Attorney to elect upon which count or counts he would prosecute these appellants, setting out that the Government would be able to offer no substantial proof tending to connect them without the commission of the offenses alleged in the counts above enumerated, which was also overruled by the Court. (Tr. p. 72).

Each of these motions were renewed after the Government had closed its case, and before the appellants were called on to offer their defense, and each of said motions were renewed when both sides had closed.

The appellants, at the close of the Government's case, which was renewed after both sides had closed, duly and seasonably moved for an instructed verdict of not guilty, on the grounds that it appeared from the testimony that there was a fatal misjoinder of persons and offenses; that if any conspiracy had been shown at all, that the testimony developed that there was at least four separate and distinct smaller conspiracies,

not connected together, and there was a fatal variance between the allegations in the indictment and the proof adduced from the witness stand, which was prejudicial to the rights of the appellants, branded them as habitual criminals, and was calculated to create in the minds of the jury that they were professional criminals, engage in a nation-wide ring of violators of the Harrison Anti Narcotic Act, and so prejudiced and inflamed the minds of the jury against them as to prevent them from receiving a fair and impartial trial and consideration from the jury.

These appellants then sought, to protect their rights, to be tried independently for the offenses of which the Government might offer proof tending to connect them with, by moving the Court to limit the testimony of the various witnesses to the defendants actually involved in the commission of the various offenses, as will more fully appear in the appellants' assignment of errors Nos. 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31 and 32.

Dewey Ross, one of the defendants, testified, (Tr. pp. 195-200), that he went to Richmond, Texas, to contact Bessie Blakeley and Bubba Blakely, to sell them some narcotics; that he went to New York after narcotics, and that he sold the Blakeleys some of these narcotics at different times, and that none of the other defendants, in so far as he knew, knew anything about this transaction, and that they were transactions purely between him and the Blakeleys, with which none of the

other appellants had any connection, to which these appellants objected, and moved the Court to limit to the defendants, Dewey Ross and Marie Ross, which was overruled by the Court, and an exception taken by the appellants. (Assignment of Errors Nos. 14, 16, and 17.)

That William E. Frey, a Government witness, testified that in Chicago, Illinois, on April 16th, 1939, he arrested Jacob Roamer, and seized 20 ounces of heroin; that at the time of this trial, Jacob Roamer was serving a sentence in the United States Penitentiary at Leavenworth, Kansas, for having committed this offense. These appellants objected to this testimony, and moved that it be limited to the defendant, Roamer, that it was a separate and distinct transaction, in no way connected with the case on trial, and was inadmissible in all purposes, which the Court overruled, and to which the defendants excepted. (Assignment of Error No. 19.)

George Belcove, a Government agent and witness, testified that on June 5, 1939, in Chicago, Illinois, George Taylor was instrumental in the sale and delivery of 4 ounces of heroin to one Emmett Gentry, an informer working under witness' direction; that the said George Taylor was convicted for this offense, and was, at the time of this trial, serving a sentence therefor in the United States Penitentiary at Leavenworth, Kansas, to which said testimony the appellants objected for the reason that it was, as to all of them, a separate

and distinct transaction, in no way connected with the case on trial, and as to the said George Taylor, amounted to putting him twice in jeopardy for the same offense. (Assignment of Errors Nos. 20 and 21.)

D. E. Robertson, a witness for the Government, testified that on February 27th, 1939, he arrested Beulah Franks, and found in her possession a few grains of morphine, to which said testimony these appellants duly objected for the reason that it was out of the presence and hearing of the appellants, a separate and distinct offense, in no way connected with the case on trial, which the Court overruled and the appellants duly excepted. (Assignment of Error No. 22.)

The said D. E. Robertson further testified that on various occasions Beulah Franks turned over to him certain quantities of narcotics; it being shown that Dewey Ross, one of the defendants, made these sales to said Beulah Franks; that Dewey Ross testified that they were independent transactions between him and Beulah Franks; that he was indicted in a separate indictment for these offenses; that none of the other defendants knew of, or had any connection with, such transactions, to which testimony defendants objected, and moved the Court to limit same to the defendant, Dewey Ross, for the reason that they were separate and distrinct transactions, in no way connected with the case on trial, as to any of the defendants except Ross, which the Court overruled and the defendants excepted. (Assignment of Errors Nos. 23 and 24.)

The Government witnesses George Hood, V. C. McCullough, Joseph H. Bell, and Moore, testified that in Dallas, Texas, about July 22nd, 1939, the defendants Cliff Green and his wife, Lavert Green, sold certain narcotics to the said George Hood; that the said Cliff Green and Lavert Green had theretofore been convicted for these sales; that Lavert Green was dead, and that Cliff Green, at the time of this trial, was serving a 3 year sentence in the United States Hospital at Ft. Worth, Texas, for this same offense. These appellants objected to this testimony for the reason that it was a separate and distinct transaction between Green and Hood, and in no way connected with the case on trial, which the Court overruled and these appellants excepted. (Assignment of Errors Nos. 25, 26, 27, and 28.)

Neal C. Windberry, a Government witness, testified that he arrested Tommy Cooper in Brooklyn, New York, and seized certain narcotics and documents from Cooper, more fully set out in Government exhibits Nos. 43, 44, 45, 46, and 47, being, among other things, a book containing the names of these appellants, together with many known and notorious criminals, to which these appellants objected for the reason that such documents and books were highly prejudicial, calculated to inflame the minds of the jury against these appellants; that it was purely hear-say to them, that it was not shown that they knew of such book, was acts and transactions of other and different persons,

out of the presence and hearing of the appellants, and beyond their control, not binding on them, which objection the Court overruled, and the appellants excepted. (Assignment of Error No. 30).

The Government witnesses, John Catana and Raymond A. Richards, testified that in March, 1938, in New Orleans, Louisiana, the appellant, Abe Chapman, sold and delivered to one Alvarez, at John Catana's house, 45 ounces of heroin; that theretofore, the appellant, Chapman, had been convicted for this offense in the United States District Court, at New Orleans, and at the time of the trial of this case, was serving a sentence for this violation in the United States Penitentiary at Leavenworth, Kansas, to which said testimony these appellants objected for the reason that as to Abe Chapman it amounted to putting him twice in jeopardy for the same offense, and as to the other appellants, it was a separate and distinct transaction, independent in itself, and in no way connected with the case on trial, which said objection the Court overruled, and the defendants then and there excepted. (Assignment of Errors Nos. 31 and 32.)

These appellants respectfully urge that the commission of the separate offenses above set out clearly show that there was a misjoinder in this case, and that they were calculated to, and inevitably did, prejudice the minds of the jury against them; that these offenses were separate and distinct, complete in themselves, some of which were committed by some of the defend-

ants at onetime, and others of which were committed by others of the defendants at other and different times, and the evidence of which prejudiced the rights of these defendants, branded them as habitual criminals, confounded them in their defense, and so inflamed and prejudiced the minds of the jury in such a way as it was calculated to and did, so prejudice the minds of the jury against them, as to prevent them from receiving that fair and impartial consideration from the jury to which they were entitled.

AUTHORITIES

McElroy v. U. S., 164 U. S. 76, 41 L. Ed. 355;

Coco v. U. S., 189 Fed. 289 Fed. 33;

Wyatt, et al v. U. S., 23 F. (2) 791; 227 U. S. 588; 72 L. Ed. 1002;

L'Rosa, et al v. U. S., 15 Fed. (2) 749;

Edenfield, 8 Fed. (2) 614(reversed), 273 U. S. 660; 71 L. Ed. 827;

De' Luca v. U. S., 298 Fed. 412;

Vaccaro v. U. S., 30 Fed. (2) 678.

Under Propositions Nos. Three, Four, and Five

We think that Propositions 3, 4, and 5 are so closely related that they might be treated together. Aaron Goldberg, a Government witness, testified that in 1937,

he was serving a term in the United States Penitentiary Annex, at Leavenworth, Kansas, for a violation of the Harrison Anti Narcotic Act, and while there met the defendants Charles Schiffman and Abe Chapman, to which testimony the appellants objected and moved the Court for a mistrial, for the reason that these defendants had not taken the stand, had not put their reputations in issue, and this testimony was of such prejudicial and inflammatory nature that its harmful effect could not be cured by the mere instruction of the Court to the jury that they must not consider that these defendants were in the penietntiary, but just merely to consider that the witness met these defendants at Leavenworth, Kansas, which motion for a mistrial the Court overruled, and the appellants then and there excepted, (Tr. p. 107); Dewey Ross testified that he was indicted in the United States District Court for the Northern District of Texas, at Ft. Worth, for a prior offense of violating the Harrison Anti Narcotic Act; that the day before his trial was to come up, Chadwick told him that he would get 15 years, and his wife would get 5 years; that he was not telling him what to do, but that it was a mighty big world; that he and his wife, Marie, failed to show for their trial, forfeited their bonds, and went to Phil Chadwick's house, where they were harbored by Chadwick for some several months. In this connection, it was admitted that an indictment at this time was pending against Chadwick in this Court for harboring Marie and Dewey

Ross, and appellants say that this testimony was evidence of an extraneous crime, separate and distinct, in no way connected with the case on trial, and was of such prejudicial and inflammatory nature, as was calculated to, and did, prejudice the minds of the jury against Chadwick, and was of such harmful nature that would prevent him from getting fair and impartial consideration from the jury; the appellants objected to this testimony for the reasons set out, and the Court overruled same, to which appellants excepted, (Tr. p. 176-79).

As is more fully set out in appellants' assignment of error No. 18, the Government witness Glenn Cox testified that he had seen Abe Chapman while he was serving a sentence in the United States Penitentiary at Leavenworth, Kansas, in 1935 and 1936, (Tr. p. 289-90); that as set out in appellants' assignment of error No. 15, Dewey Ross testified that he had taken 25 ounces of heroin back to Phil Chadwick, from whom he had theretofore purchased it, for the reason that he had used some of this narcotics, that it had been cut with poisonous chemicals, and had caused sores to break out on the witness, Ross, (Tr. p. .....), and more fully appearing in appellants' assignment of error No. 15, to all of which testimony appellants objected for the reason that it was prejudicial, inflammatory, and of such harmful nature as would cause the jury to believe that Chadwick was a murderer, dealing in poisonous drugs, and calculated to so inflame

the minds of the jury against Chadwick, as to prevent them from giving him a fair and impartial trial, which said objection the Court overruled, and the appellants excepted.

That Joseph H. Bell, a Government witness, and agent, testified (Tr. pp. 614-15) that Cliff Green told him, "I give you all the lead you wanted; I told you everything; but I am not going to tell you any more, because I have to live; I am not going to testify against them (the defendants on trial) because if I do, they will kill me." The appellants objected to this testimony for the reason that it was prejudicial, inflammatory, and calculated to lead the jury to believe that the appellants were killers and murderers, moved the Court for a mistrial, and for the further reason that this testimony was of such prejudicial and inflammatory nature as would inevitably prevent the jury from giving these defendants a fair and impartial trial, which the Court overruled and the appellants excepted.

In his closing remarks to the jury, the Honorable Clyde O. Eastus, United States District Attorney for the Northern District of Texas, stated to, and in the presence and hearing of, the said jury:

> "I am not going to discuss much in this case except the defendant, Shaffer, for the reason that there has been no evidence to refute the Government's case against any other defendant in this case, with the exception of Schaffer. Have you heard any witness on the stand testify to anything refuting any evidence that the United States Gov-

ernment put on the witness stand, outside of the evidence of the defendant, B. H. Schaffer? Not a particle. I will not waste any time on them. *Nobody* has denied what the Government has offered." (Tr. p. 956)

The appellants objected and excepted to these remarks, and moved the Court for a mistrial for the reason that none of the defendants, except Schaffer had taken the stand, and the remarks of the United States Attorney was directly referring to their failure so to do, and was of such inflammatory and prejudicial nature as was calculated to prevent the jury from giving these defendants a fair and impartial trial.

Further, in his closing remarks to the jury, the Honorable Clyde O. Eastus, United States District Attorney, stated to, and in the presence and hearing of, the said jury, the following:

"If you want to find out what is going on in the inside, you have got to go on the inside and bring somebody out, as we have done here. I would not ask you to convict these defendants on the testimony of Glen Cox and Dewey Ross, unless they were corroborated, and let us see whether they are. Does *anybody* deny Dewey Ross and his wife lived at Phil Chadwick's house? Did Dewey Ross go register at the Plymouth Hotel? He certainly did. The record is in this court here. Is that corroboration? Can you believe them? Is he telling the truth?

"Leftak and Schiffman's records are here. Is there any dispute about that? Can you believe Glen Cox? Of course you can. Let me tell you

> something else. My experience has been that when any witness testifies against a Government agent he is telling the truth. You talk about they have got him here under guard—yes. he is here under guard, so that some of you fellows won't kill him before he testifies."

Government counsel seek to justify Mr. Eastus' remarks as being in answer to an argument by Mr. Mack Taylor, counsel for B. H. Schaffer, wherein Mr. Taylor stated to the jury that the Government had Dewey Ross, Mrs. Dewey Ross, and Glenn Cox under guard to keep them from taking dope. In this connection, these appellants wish to call this Honorable Court's attention to the fact that Taylor represented no one with the exception of Schaffer, and Mr. Eastus' statement was made in a sweeping gesture toward all the defendants that , "we have them under guard to keep you fellows from killing them." He did not say that they were under guard to keep Schaffer from killing them, but he referred directly to all the defendants. Certainly counsel representing other of the defendants could not be bound by anything that Mr. Taylor said. In addition to this, the defendants and Government witnesses, Ross, Mrs. Ross, and Cox, were confined in the Government Hospital at Ft. Worth, Texas, had not made bond after the indictment was returned, and were brought to and from the Courtroom by guards from the Government Hospital. This fact was well known to Mr. Eastus, and he knew that they were under guard for no other purpose.

The Court allowed us a full bill, including the right to show that these defendants and witnesses had not made bail, that they were confined in the Government Hospital and that they were brought to and from this hospital by the Hospital Guards, who guarded them in the Courtroom, as they would any other defendant, not having been admitted to bail, which the Government admits to be true. To which said argument the appellants then and there excepted and objected, and moved the Court for a mistrial for the reason that this argument was prejudicial and of such highly inflammatory nature as to lead the jury to believe that they were trying a bunch of killers and murderers, and its ill effect could not be cured by instruction of the Court to disregard it, which said motion the Court overruled, and the appellants excepted. (Assignment of Errors Nos. 11, 12, 13, 15, 18, 29, 34, and 35.)

We are discussing assignments 11, 12 and 13 together as we believe that the same issues are substantially involved therein. It is here pointed out that perhaps the most damaging statement made with reference to assignment No. 13 was the fact that Philip Chadwick had been indicted in another court when such was entirely collateral to the issue which was being tried.

As to assignments Nos. 11 and 12, the statements made by Goldberg that he saw Schiffman and Chapman at Leavenworth are also in our opinion reversible error as the judge should have granted a mistrial.

Perhaps the clearest exposition of the rationale behind the line of cases upholding our point of view can be found in Boyd vs. U. S., 142 U. S. 450, where the Supreme Court stated:

> "Proof of them only tended to prejudice the defendant with the jurors to try to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community and who were not entitled to the full benefit of the rules prescribed by law, for the trial of human beings charged with crimes involving the punishment of death. Upon a careful scrutiny of the record, we are constrained to hold that in at least the particulars to which we have averted, these rules were not observed at the trial below. *However depraved in character and however full of crimes their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged.*" (Italics ours).

Another case whose language is of great interest is that of Mercer vs. U. S., 14 Fed. (2d) 281, where the court states at page 283:

> "But not having testified and not having put in issue his reputation of good character or his credibility, the general rule of law is that evidence assailing his character or showing previous conviction is not admissible."

See also:

Thompson vs.U. S., 283 Fed. 895;

Guilbeau vs. U. S., 288 Fed. 311;

Newman vs. U. S., 289 Fed. 712;

Jianoli vs. U. S., 299 Fed. 496.

We also wish to call your attention to the case of U. S. vs. Dressler, 112 Fed. (2d) 972, and the language quoted by the court at page 981.

See also:

Fish vs. U. S., 215 Fed. 544;

Paquin vs. U. S., 251 Fed. 577;

Manuel vs. U. S., 254 Fed. 272.

Assignment of Error No. 34 involves a statement by the prosecutor in relation to the failure of the defendants to testify. In considering the same, please scrutinize cases cited as to assignments 11, 12 and 13, for in reality the same point is applicable. However, more specifically under this point we wish to call the Court's attention to the case of Wilson vs. U. S., 149 U. S. 60, in which the Supreme Court reverses a decision of the trial court wherein the prosecuting attorney made a statement with reference to the defendant's failure to testify on his own behalf.

Perhaps the most important point to be raised in relation to Assignment of Error No. 35 is a statement by the prosecuting attorney to the effect, "Yes, he is here under guard so some of you fellows can't kill him before he testifies." This statement is not only vicious, but prejudicial as it is extremely inflammatory and not

based on any evidence adduced at the trial. For cases in which the Appellate Courts have reversed the lower courts because of such statements made by the prosecutor, see:

Williams vs. U. S., 168 U. S. 382;

Allen vs. U. S., 115 Fed. 4;

Lan vs. U. S., 13 Fed. (2d) 975;

Rossi vs. U. S., 9 Fed. (2d) 363.

In regard to the other statements made herein to the effect that Schiffman and Leftak had records without them even taking the stand and putting their character in question, the cases cited under assignment Nos. 11, 12 and 13 would also be applicable herein.

We also wish to call the Court's attention to a very recent case. U. S. vs. Minuse, 114 Fed. (2d) 36. In that case the Circuit Court of Appeals, Second Circuit, reversed a conviction of the defendants on the grounds that the prosecutor asked a government witness whether he had embezzled money from a bank which he subsequently used in a concern operated by defendants. The court stated that it was obvious that the only reason the question was asked was to show that the defendants associated with embezzlers and such a question was unconscionable.

See also:

U. S. vs. Sprengel, 103 F. (2d) 876;

Fitter vs. U. S., 258 F. 567, 573;

Berger vs. U. S., 295 U. S. 78, 89.

Under Proposition Number Six

Neither of the appellants took the witness stand in his own behalf. But, without request from them, and over their objections, the Court charged the jury that the appellants had the right to take the witness stand if they chose, and that they had a right not to testify. But, if they did not testify, this fact should not be considered a circumstance against them, and that such failure to testify on the part of the defendant should not be discussed by the jury during their deliberation; to which said portion of the Court's charge, the appellants objected and excepted for the reason that it overly emphasized such failure, that it was calculated to lead the jury to believe that they were guilty, unable to stand cross-examination, and that such failure would, in effect, be tantamount to their admission of guilt. (Tr. pp. 974-77).

Assignment of Error No. 9 relating to the failure of the defendants to take the stand in their own defense is of particular importance and we believe one of the principal grounds upon which a reversal must be had.

This charge of the Court was contrary to the provisions contained in the Fifth Amendment and also in 28 U. S. Code, Section 632. Perhaps the most im-

portant decision in this respect can be found in the case of Bruno vs. U. S., 308 U. S. 287, a very recent declaration by the Supreme Court reversing a decision of the trial court and on practically the identical issue raised herein. For other pertinent cases see:

U. S. vs. Brookmar, 1 Fed. (2d) 528;

McKnight vs. U. S., 115 Fed. 972;

Stout vs. U. S., 227 Fed. 779;

Michael vs. U. S., Fed. 7 (2d) 865;

Hersh vs. U. S., 68 Fed. (2d) 799;

Gold vs. U. S., 102 Fed. (2d) 350, 352;

Sporf vs. U. S., 156 U. S. 51.

We would like to point out that the language in the BRUNO case, supra, is of extreme interest and Mr. Justice Frankfurter in his discussion of the psychological aspect of this situation quotes language which we believe to be very worth-while and impressive. We are referring more specifically to the last paragraph of the said decision:

Under Proposition Number Seven

In his charge, the Court instructed the jury, in effect, that where two or more persons are guilty of a conspiracy, the acts and transactions of each of the conspirators becomes the acts and transactions of all members of the conspiracy, and the appellants objected and

excepted to this portion of the Court's charge, for the reason that the Court did not charge the jury that such conspiracy must first have been established by competent evidence beyond a reasonable doubt, and that such transaction or act of conspirator were in furtherance of the conspiracy, as alleged, before such acts or transactions of one of the conspirators could become the acts and transactions of others charged, which said objections and exceptions the Court overruled, and the appellants then and there excepted. (Tr. p. .....). (Assignment of Error No. 36.)

This assignment deals with the failure of the court to charge that they must find first that a conspiracy actually existed before charging that the declaration of a co-conspirator is binding on all the other members of said conspiracy. We think it is the rule of evidence that in a conspiracy before testimony of a co-conspirator is admissible, the existence of a conspiracy must be shown. As a consequence, it would logically follow that the charge requested should have been given you.

See:

Pope vs. U. S., 289 Fed. 312;

Staeger vs. U. S., 233 Fed. 510;

U. S. vs. Freedman, 268 Fed. 655;

Langer vs. U. S., 76 Fed. (2d) 817;

Tingle vs. U. S., 38 Fed. (2d) 573;

Dahly vs. U. S., 50 Fed. (2d) 37;

U. S. vs. Falcone, 109 Fed. (2d) 579.

Under Propositions Numbers Nine and Ten

We wish to call the Court's attention to the verdict of the jury as detailed in appellant's statement of the nature of the case, in the beginning of this brief. It can readily be seen that the verdict is so vague and indefinite as to be unintelligible. We doubt that a plea in former jeopardy could successfully be urged and maintained upon many offenses alleged in the indictment, for instance—the verdict as to Charles Schiffman was, "We further find the defendant, Charles Schiffman, guilty in counts 1 to 6, inclusive, and count 42," not disposing of counts 7 to 41, inclusive, as to Schiffman.

The verdict as to Abe Chapman is that, "We further find the defendant, Abe Chapman, not guilty as charged in counts 11 to 41, inclusive. We further find the defendant, Abe Chapman, guilty in counts 1 to 6, inclusive, and count 42," and not disposing of counts 7 to 11.

The verdict as to Phil Chadwick is, "We further find the defendant, Phil Chadwick, not guilty as charged in counts 1 to 6, inclusive. We further find the defendant, Phil Chadwick, guilty in Counts 7 to 42," which said verdict, in our opinion, would not include 42, which was the conspiracy count.

The verdict as to Mrs. Phil Chadwick is, "We further find the defendant, Mrs. Phil Chadwick, not guilty as charged in counts 1 to 6, inclusive. We further find the defendant, Mrs. Phil Chadwick, guilty in counts 7 to 42," which said verdict stated, "7 to 42," and does not use the word "inclusive". It is our contention that Mrs. Chadwick was not found guilty on count 42. In this connection, we wish to call the Court's attention to the sentence imposed on Mrs. Phil Chadwick, (Tr. p. .....), wherein, she is sentenced to "two (2) years on count 42, and for 5 years generally on counts 7 to 41, inclusive.

"It is further ordered that execution of said sentence on counts 7 to 41, inclusive, be, and is hereby, suspended, and the defendant be placed on probation for five (5) years after execution of sentence on count 42."

We respectfully submit Mrs. Phil Chadwick was not found guilty as to count 42, and, therefore, so much of her sentence as directs that she be confined in the United States Reformatory at Alderson, West Virginia, for a period of two years, must fall, and her plea in abatement especially should have been suspended.

AUTHORITIES

Dealey vs. U. S., 152 U. S. 439; 41 S. Ct. 680; 38 L. Ed. 545;

Jolly vs. U. S., 170 U. S. 402; 42 L. Ed. 1085;

Sylvester vs. U. S., 112 U. S. 216; 5 S. Ct. 118; 28 L. Ed. 697.

Under Proposition Number Eleven

In connection with this proposition, appellants wish to call the Court's attention to assignment of error No. 33. The letter in question had been admitted over the objection of the appellants, for the reason that there was, at the time the letter was brought into this court, an action pending in the District Court in and for the Southern District of New York, to suppress this letter, which said Court had not passed upon the issue of its suppression, and which action had been brought on the ground that it had been seized as a result of an illegal search, and there was no order obtained from that Court to remove it to the United States District Court for the Northern District of Texas, to be used in evidence.

In the second place, appellants contend that it was error for the Court, over their objections, to make enlarged reproductions of this letter, and of admitting specimens of appellant's, Chadwick's, handwriting, and display it before the jury, as tending to overly emphasize its importance, and was of such harmful nature as to unduly prejudice the minds of the jury, and to lead them to believe that if the letter was in truth and in fact one written by Chadwick, that his conviction should be certain.

Therefore the introduction of the letter in evidence in spite of the fact that a motion was pending in another district to suppress the said letter, must be considered extremely prejudicial to the rights of the defendants. It must not be forgotten that the said motion was pending in a court of coordinate and equal jurisdiction to that where the trial of the instant matter was being conducted, and that no decision had been rendered by the District Court in and for the Southern District of New York, as to the validity of the said motion. As a consequence, the district court in Texas had no right to admit the said letter in evidence until a final determination of the efficacy of Schiffman's contention had been passed upon.

AUTHORITIES

Silverthorne vs. U. S., 251 U. S. 385;

Boyd vs. U. S., 116 U. S. 616;

Weeks vs. U. S., 237 U. S. 383;

Agnello vs. U. S., 269 U. S. 20;

Go-Bart vs. U. S., 282 U. S. 344.

It cannot be said that the errors complained of did not affect a substantial right of these appellants. Clifton Green had been convicted in the United States District Court for the Northern District of Texas at Dallas along with his wife for selling narcotics to George Hood, for which the United States Attorneys then

thought separate and distinct transactions of him and his wife, and while his wife, LaVert Green, had received a suspended sentence and had thereafter died, Clifton Green was, at the very time of his trial, serving the sentence imposed upon him for this separate and distinct transaction. While these transactions were not set out as substantive offenses, they were alleged as overt acts of the conspiracy, all the testimony used in his former conviction was brought out and paraded before the jury, and, in addition to that, Joseph H. Bell testified that Green had told him that he would tell everything, but would not testify because he was afraid these appellants would kill him. Think of it! The Court attempted to limit the testimony as to Green only, and Green is not appealing, but how could a jury of laymen fail to be prejudiced against a bunch of men whom they thought to be killers? Besides all this, if this Court pleases, Bell's conversation with Green was after he had been convicted and his part of the conspiracy, if any, was presumed to have ceased.

Schiffman and Liss, alias Cooper, had been convicted in New York for their part in the alleged conspiracy on what the authorities then deemed to have been a separate and distinct transaction, yet all the testimony, exhibits, and narcotics used in their trials there were used in this trial. They were brought from the penitentiary to be tried along with these appellants, and not one line of testimony was introduced to show that any of the other appellants participated in these

transactions. The Court also attempted to limit this testimony as to the count of conspiracy against them alone, but the jury got the full benefits of it as to the other appellants.

Chapman had been convicted in the United States District Court at New Orleans. George Taylor, Arthur C. Roberts, and Jacob Roamer had been convicted in Chicago, all for violating the Harrison Anti Narcotic Act, and were serving their sentences for these violations in the United States Penitentiary at Leavenworth, Kansas, yet the very same testimony, narcotics, and other exhibits theretofore used in their convictions were introduced and paraded before the jury in this trial. If these were not separate and distinct transactions, complete in themselves, some of which were committed by some of the defendants at one time and others of which were committed by others of the defendants at other and different times, then there can be none. If this is allowed, then we might as well have only one indictment at each term of court, where all the defendants charged might be joined in that one indictment, and have only one trial for each term of court. This procedure would not be enlarging much on what was had in this case. Imagine a jury of laymen intelligently and properly limiting testimony to the various ones of twenty-nine defendants, charged in an indictment of forty-two counts of substantive offenses, and ninety-two overt acts committed in furtherance of a conspiracy, and covering transactions in New

York, Chicago, Houston, Fort Worth, Dallas, Jacksboro, and Richmond, over a period of three years!

In McElroy vs. United States, supra, which we think clearly applicable to this case, the Court said:

> "And in our opinion, they were not for two or more transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves, and independent of each other, committed at different times, and not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him in his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense, or restrict the evidence to one transaction.
>
> "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts."

Counsel for the Government contend that the Court properly limited the testimony to the various defendants of their various transactions, and that only the

Chadwicks, Chapman, Schiffman, Beland and Barkley are appealing, and that the others accepted sentences imposed upon them, and that these appellants cannot be heard to complain as to the testimony that was limited, or attempted to be limited, to the others, but, as stated in McElroy vs. United States, supra, this position is erroneous, and quoting further from that decision, it is said:

> "It is admitted by the Government that the judgment against Stuffelbeam and Charles Hook (two of the defendants) must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed, because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial or punishment, may be joined in the same indictment, subject to the power of the Court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The Government contends that each and every one of the defendants were charged with the commission of each and every offense alleged in the indictment; that one count of conspiracy was alleged, and if the defendants were found guilty of the conspiracy count, then it follows that each and every one of them so found guilty of conspiracy, would be equally guilty of all counts in the indictment, whether or not they knew of or had any connection with the actual commission of the offenses. But the evidence does not support this contention. Ross testified (Tr. pp. 207-31) that no one had anything to do with the sales he made to the Blakeleys, to Cox, to Beulah Franks, or to any one else, except him and his wife. He said that when he bought narcotics from any of the other defendants, he paid for it, it became his, and what he did with it from there on, was no concern of any of the other defendants. It is not contended that any of the other defendants participated in the sales by Green to Hood, or sales made by Cox, Roamer, Roberts, Chapman, Schiffman, or by others except the ones actually making the sales, except that some of such narcotics may have been bought by them from others of the defendants at wholesale to be retailed by them, but in each instance they testified when they bought it, it became their own, they paid for it, and what they did with it from the time they purchased it was purely their own business. It is so well settled that a buyer and seller of contraband narcotics are not guilty of a conspiracy, except where

there is an agreement between them that they will purchase exclusively from one seller, or that there might be an agreement as to its disposition, that it would be mere surplusage to quote authorities or argue. There is no evidence of exclusive purchases or agreement as to disposition of the purchases made in this case.

Therefore, the conclusion is inescapable that the indictment contains many separate and distinct offenses, complete in themselves, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, as was alleged and pointed out in the appellants' general demurrer and motion to quash, petition for severance, and petition for order directing the United States District Attorney to elect, filed before each arraignment, and renewed at the close of the Government's case, and when each side had closed.

This very situation is fully and ably discussed in Coco v. United States, 289 Fed. 33, from which we quote as follows:

> "We are clear in the opinion that an indictment would be fatally defective if upon its face it charged several defendants for several offenses committed by them independently of each other, some of which were committed by some of the defendants at one time, and some of which were committed by other of the defendants at a different time. Where these facts do not appear upon the face of an indictment, but do appear on the trial from the evidence, the

defendants are as much entitled to the benefit of protection of the rules of law above laid down as if the indictment had fairly stated the facts. However unobjectionable on its face an indictment may be, conviction under it may not lawfully result from proof of the identical facts which would, if distinctly stated in it, vitiate the indictment and enable the defendants, even after conviction, to arrest or reverse any judgment rendered on it against them.

"If two offenders be charged in one indictment which is faultless in form, and it be developed in the evidence that the two defendants committed their several offenses at different times or places —in other words that they are not guilty of one and the same offense—the proof does not sustain the indictment. In the present case, according to the recitals in the Bill of Exceptions each defendant was equally guilty, but they did not participate in one and the same offense. This was not shown until the evidence was given to the jury. At that stage of the trial each defendant was placed in legal jeopardy and was entitled to have a verdict of the jury on the question of his guilt in the absence of some statutory or legal ground, authorizing a nolle prosqui or other withdrawal from the jury, that another indictment might be preferred or continuance granted. The defendant having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, cannot be again tried for the same offense."

The doctrine above laid down is also supported and approved by:

Brine v. U. S., 200 Fed. 726;

U. S. v. Dietrich, 126 Fed. 664 (opinion by Mr. Justice Van Deventer, now retired);

United States v. McConnell (D. C. Pa. 1923), 285 F. 164.

It is unbelievable that the defendants' rights were not prejudiced by the testimony of Cox, and Goldberg, that they had met Chapman and Ross while they were serving terms in the United States Penitentiary at Leavenworth, Kansas, for violating certain provisions of the Harrison Anti Narcotic Act. The jury could not help but conclude that they were trying a gang of habitual criminals. Can anyone be credulous enough to believe that Chadwick's rights were not prejudiced by introducing into evidence testimony that he had harbored fugitives from justice, for which an indictment was pending against him, in a separate and distinct case, pending in the very Court in which he was then being tried for his liberty under this indictment?

Who can say that the rights of these appellants were not prejudiced and the minds of the jury so inflamed as to create resentment, which could not possibly be erased from their minds by mere instruction from the Court by the speech of the United States District Attorney, wherein he told them that Schiffman's and Leftak's records were before them, wherein in truth and in fact it was not before them, but leading the jury to believe they were habitual criminals, killers, and incessant law breakers, and where the United

States District Attorney told the jury that he had the Government witnesses, Ross, Mrs. Ross, and Cox, under guard to keep these appellants from killing them before they testified, whereas in truth and in fact, Mr. Eastus knew that they were under guard because they had not made bond after this indictment had been returned against them?

Can it be said that the testimony of Joseph H. Bell that Clifton Green had told him that he could not testify in this case because these appellants would kill him, did not so prejudice and inflame the minds of the jury, and create resentment to such an extent as it would be practically impossible for the jury to give them a fair and impartial consideration upon any issue in the case?

This Court may well take judicial notice that, at best, the average juror in Federal Court has reversed the presumption of innocence. They believe that anything a Government agent testifies to, or that a United States Attorney says, even in the heat of argument, is undeniable law.

The petitioners, and each of them, here and now reurge every assignment of errors heretofore urged in the Court below and insist that in their humble judgment, such errors so assigned and urged were of such harmful nature, and so affected their substantial rights as would necessitate a reversal of this cause; they especially urge further that the errors complained of by

them materially and substantially affected the verdict of the jury returned against them; that, as above set out, they abandon none of the assignments of errors or propositions urged in their original appeal to the United States Circuit Court of Appeals and brief filed thereunder, but earnestly here reurge each and every one of them.

Petitioners especially urge that it was substantial error affecting their substantial rights, to force all of them to go to trial together, and for the trial court to fail and refuse to: (1 overrule their motion to quash and general demurrer to the indictment; (2) to fail and refuse to grant to them, and each of them, petition for severance; and (3) to fail and refuse to order the United States District Attorney to elect upon which count or counts he would go to trial as to each of these petitioners. In this connection, these petitioners respectfully call this Honorable Court's attention to the fact that before they pleaded to this indictment, they filed and urged their general demurrer and motion to quash, (Tr. p. 65); motion for severance, (Tr. p. 64); and their motion to require the United States District Attorney to elect upon which count or counts he would prosecute each of these petitioners, (Tr. p. 66); that each of these petitions and motions were renewed after the Government had rested (Tr. p. 74), (Tr. p. 76), and (Tr. p. 77) respectively, and which said motions were so renewed after both sides had closed.

Petitioners earnestly urge that there was a misjoinder of persons and offenses in this case, in that the offenses as set out in the various counts of the indictment, if committed at all, were committed by some of the petitioners, at one time, and others of the defendants who did not appeal, at one time, while others of said offenses, if committed at all, were committed by others of the defendants at other and different times, in no wise connected together, not part of the same series of acts or transactions, separate and distinct, and in no way connected together so as they might be joined in one indictment.

The record shows that the offenses committed by Abe Chapman were committed by him in New Orleans, Louisiana; that he had theretofore been convicted for those offenses, and was, at the time of the trial, serving his sentence imposed upon him for the same offenses; the record discloses also that Louis Sherman, Charles Schiffman, Moe Liss, Glenn Cox, Clifton Green, George Taylor, Arthur C. Roberts, and Jacob Roamer had theretofore been convicted, and at the time of the trial they were serving the sentences imposed upon them for such conviction, and that Dewey and Marie Ross had theretofore been indicted in a separate and distinct indictment for the offenses joined against them in this indictment, yet all these offenses were joined against all the defendants in this indictment. The record discloses that they had acted separately, distinctly, and apart from each and all of the defendants, and

that such transactions on their part were independent and separate transactions, and in no way connected with the main offenses contained in the indictment.

It is well settled in this jurisdiction that buyer and seller of narcotics cannot be guilty of a conspiracy, for the reason that they are not acting in common, but approach the transaction from different angles, the one to buy, and the other to sell; these petitioners earnestly urge that the only substantial evidence offered to prove, or tend to prove, that there was such connection between them as would permit their being joined in the same indictment, was that the narcotics they had or sold probably came from a common source.

These petitioners earnestly urge that there is a vast difference between this case and the Ginsberg case cited by the United States Circuit Court of Appeals for the Fifth Circuit in this case (96 F. (2d) 433). In that case there was testimony that Ginsberg, the alleged head of the conspiracy, had an agreement with the other defendants that in return for his selling them narcotics at a reduced rate, they would purchase exclusively from him. We concede that under such circumstances, a buyer and seller would be guilty of conspiracy, but there is no such evidence in this case.

Then, too, in that case, the Court held that the appellants did not sufficiently advise the Trial Court prior to their trial, in their general demurrer and motion to quash, in what respect or counts in the indict-

ment they were misjoined. These petitioners are represented by one of the same counsel that representd Ginsbrg, and most of his co-defendants, and, with the experience of the Ginsberg Case at hand, particularly pointed out in their general demurrer and motion to quash in what way they were misjoined, (Tr. 63).

These petitioners urge that it cannot be said that such misjoinder did not affect their substantial rights, in that it did actually confound them in their defense, brand them as habitual criminals, and so confuse the mind of the jury as to make it impossible for the jury to give them a fair and impartial considertion as to their actual participation in the offenses alleged. We say that under McElroy v. United States, 164 U. S. 76, 41 L. Ed. 355, such misjoinder constituted error materially affecting their rights, and that this petition should be granted.

These petitioners say that it was error, substantially affecting their rights for the Court to allow the United States District Attorney to introduce evidence in the trial of the case of these various separate and distinct offenses, as they earnestly urged in their original brief in this case, which they here now adopt and urge in this motion of certiorari.

Petitioners urge that it was such error affecting their substantial rights as the harmful effects thereof could not be removed or erased by instructions of the Court for the United States District Attorney to make

the inflammatory remarks as is more fully set out in the petitioners' assignment of errors number 34 and 35, (Tr. pp. 956, 957.)

It is well settled in this jurisdiction where such remarks of the prosecuting attorney are of such a prejudicial nature as to arouse resentment or hatred in the mind of the jury that its harmful effect might not likely be erased by mere instructions of the Court to disregard same, and that under such circumstances, such remarks would necessitate reversal of the case. These petitioners urge that the remarks of the Honorable Clyde O. Eastus, to the effect that they had killed one of the defendants to keep him from testifying in the case, clearly comes within the scope of this proposition.

In Ruling Case Law, Volume 22, Page 12, the appellants' contentions in this matter are well stated as follows:

> "The prosecuting attorney, in a criminal case, represents the people, and, having no responsibility, except to fairly discharge his duty, should put himself under restraint, and should not, in his remarks before the jury, go beyond the evidence or the bounds of a reasonable moderation. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to the prejudice seeks to procure a conviction at all hazards, he ceases properly to represent the public interest. (Clutt v. Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 A.S.R. 446; State vs. Warford, 106

Mo. 55, 16 S. W. 886, 27 A.S.R. 322 and note; People v. Fielding, 158 N. Y. 542, 53 N. E. 497, 70 A.S.R. 495 and note, 46 L.R.A. 641 and note. Note: 65 A.S.R. 349). Thus, it has been held that a District Attorney should not throw the weight of his personal influence into a case which he is conducting as a public officer by announcing his individual opinion that the accused deserved hanging. (State vs. Blackman, 108 La. 121, 32 So. 334, 92 A.S.R. 377 and note). It is the duty of the prosecutor to see that the competent evidence is submitted to the jury; and, above all things, he should guard against anything that would prejudice the minds of the jurors and tend to hinder them from considering only the evidence introduced. He should never seek by any artifice to warp the mind of the jurors by inference and insinuations. (State v. Irwin, 9 Idaho 35, 71 Pac. 608, 60 L.R.A. 716.) And, it is error for the prosecuting attorney in a criminal case to ask questions, which by insinuation and inuendo, tend to reflect on the moral character of the accused, when there is not a scintilla of testimony to justify them. (Bailey v. People, 54 Colo. 337, 130 Pac. 832, 45 L.R.A. (N.S.) 145) * * * If a conviction in a criminal case follows an improper and dangerous appeal to the prejudice of the jurors, made by the prosecuting attorney, and it is reasonably certain that his course brought about such result, the judgment will be reversed for such error whenever it is raised by a proper exception. (People v. Fielding, 158 N. Y. 542, 53 N. E. 497, 70 A.S.R. 495 and note, 46 L.R.A. 641 and note.")

These petitioners concede that where improper remarks of a prosecuting attorney are followed by an instruction of the Court to the jury to disregard same, a reversal ordinarily will not be had. However, this is not true, but the contrary is true, where such remarks are of such a prejudicial nature that the effects thereof might not likely be removed by such instructions of the Court. In 2 Ruling Case Law, Page 35, concerning this proposition, it is stated:

> "While it is true that courts of last resort have frequently, though not uniformly, applied the rules stated above, yet this rule is recognized and applied by the courts in those cases only where it is made to appear by the record, from a consideration of the character of the statements made, that their prejudicial effect was probably averted by such withdrawal, and in instruction to disregard the same. (Toledo St. L. & W. R. Co. v. Burr, 82 Ohio St. 129, 92 N. E. 27, 137 A.S.R. 771; Ricketts v. Chesapeake & O. R. Co., 33 W. Va. 433, 10 S. E. 801, 25 A.S.R. 901, 7 L.R.A. 354). It is well settled that argument of counsel may be so prejudicial to the rights of the opposite party that the prejudice can not be overcome by the Court in rebuking the attorney or instructing not to regard counsel's argument in arriving at a proper solution of the case. The reviewing court will grant a new trial when such prejudice results. (Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Brown vs. Swineford, 44 Wis. 282, 28 Am. Rep. 582, 48 Am. Rep. 336 note; 56 Am. Rep. 814 note). In this connection, it is well to consider that it is

usually impossible for the jury entirely to disregard improper and prejudicial remarks of counsel, although instructed so to do by the Court. Such remarks are fastened upon their minds and mingled with the testimony beyond possibility of separation, and necessarily receive weight in the considerations that induce the conclusion arrived at by the jury. (People v. Ah Len, 92 Cal. 382, 28 Pac. 286, 27 A.S.R. 103; Coe v. Van Why, 33 Colo. 315, 80 Pac. 894, 3 Ann. Cas. 552; Cross v. Grant, 62 N. H. 675, 13 A.S.R. 607; Bullard v. Boston & M. R. Co., 64 N. H. 27, 5 Atl. 838, 10 A.S.R. 367; People v. Fielding, 158 N. Y. 542, 53 N. E. 497, 70 A.S.R. 495, 46 L.R.A. 641, and note; Smith v. State. 44 Tex. Crim. 137, 68 S. W. 995, 100 A.S.R. 849; see also Boyd v. Portland Gen. Elec. Co., 37 re. 567, 62 Pac. 378, 52 L.R.A. 509. 58 Am. Rep. 653 note.)"

Petitioners contend that the remarks made by the Honorable Clyde O. Eastus to the effect that he had the Government witnesses in the Courtroom under guard to keep the defendants on trial from killing them like they did Jerry Seigle (a defendant who had been mysteriously killed in Chicago, and for whose death one of the defendants on trial, Tommy Stobble, had been arrested, and charges for murder were then pending against him in Chicago), clearly come within the proposition here announced, and so completely denounced by the cases cited.

The petitioner, Mrs. Phil Chadwick, earnestly urges that so much of the sentence imposed upon her on

Count 42 of the indictment to serve two years in the United States Reformatory at Alderson, West Virginia, should be set aside, independent of any other proposition in this case. She concedes it to be the law that verdicts of juries are to be liberally construed, but she says that a liberal construction of the jury's verdict in her case would be that the jury refused to find her guilty on Count 42 of the indictment. The verdict as to Mrs. Chadwick was, "We further find the defendant, Mrs. Phil Chadwick, not guilty as charged in Counts 1 to 6, "INCLUSIVE"; we further find the defendant, Mrs. Phil Chadwick, guilty in Counts 7 to 42." The only thing that we have to go by is what the jury actually said. They used the word "INCLUSIVE" in finding her not guilty of Counts 1 to 6, and in the very next breath they say "guilty in counts 7 to 42" and do not use the word "INCLUSIVE". This petitioner earnestly urge that a liberal construction of the verdict as to her would be that she was not found guilty on Count 42 of the indictment.

Under McElroy v. U. S., supra, it cannot be said that the rights of these petitioners were not prejudiced. If the Government may join in one indictment everyone suspected of crime, then the Sixth Amendment of the Constitution of the United States might well be disregarded. Petitioners earnestly urge that they were prejudiced by the errors above urged.

Wherefore petitioners pray that Writ of Certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit.

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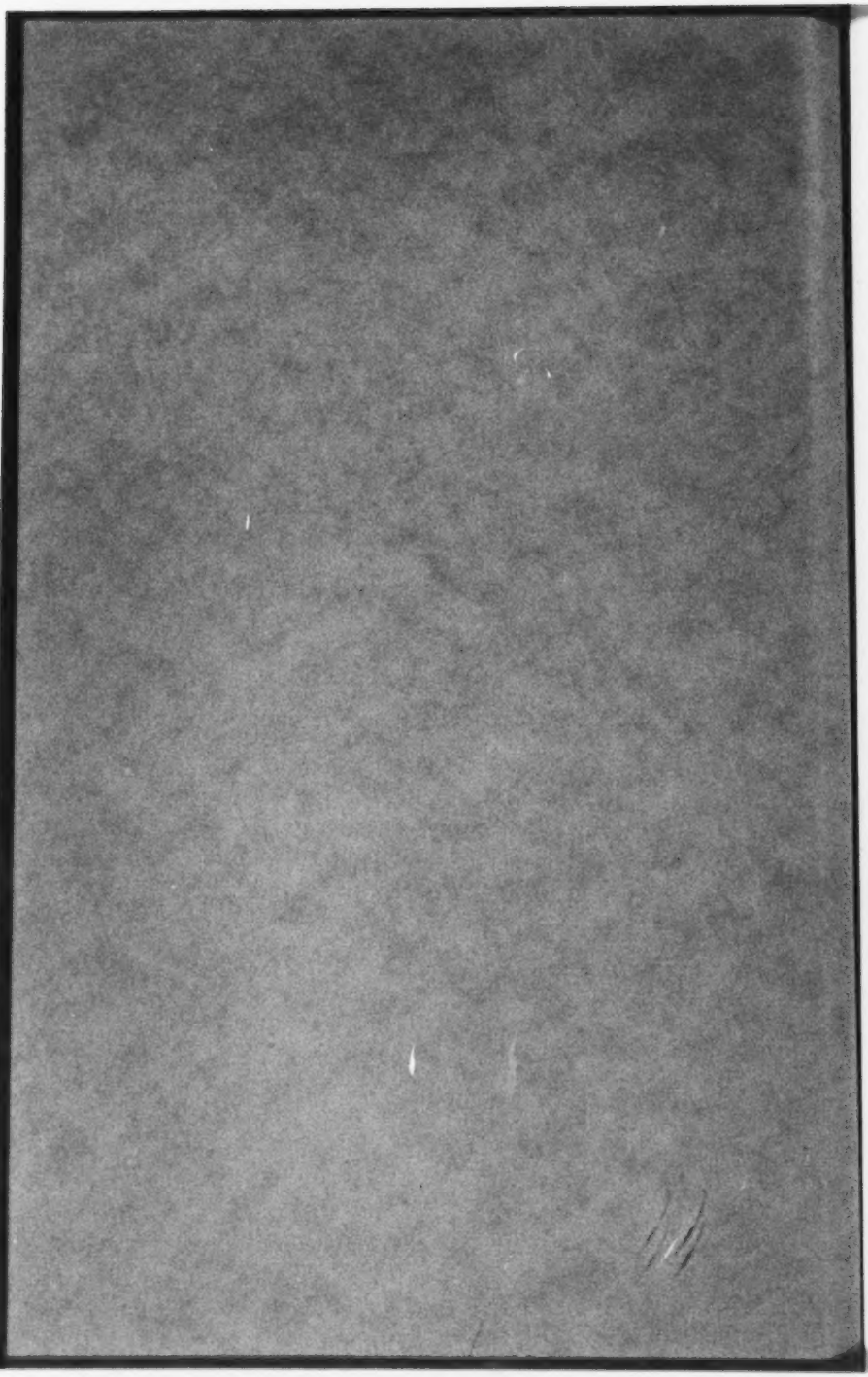
[redacted]



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No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

CHARLES BELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Summary Statement of Matters Involved

Your petitioner, Charles Beland, respectfully shows unto the Court that he was convicted in the United States District Court for the Northern District of Texas at Fort Worth, on the 18th day of July, 1940, upon three counts of a forty-two count indictment which charged forty-one substantive violations of the narcotic laws, the forty-second count charging a con-

spiracy (Sec. 88, Title 18 USCA) to violate the said laws (R. 2-38).

The cause in the trial court was styled: "The United States of America, Plaintiff, vs. Louis Sherman, et al," being No. 7486 on the Criminal Docket of said court (R. 2).

Prior to the plea of petitioner, with the date for trial set for July 1, 1940, and on, to-wit, the 20th day of June, 1940, petitioner filed with the clerk of the trial court, an affidavit of personal prejudice and bias, pertaining not only to this cause, Case No. 7486, but to other causes then pending before the trial court in which petitioner was charged by indictment, viz, Nos. 7077, 7484, and 7485. Said affidavit of personal bias and prejudice directed against the trial court, the Honorable T. Whitfield Davidson, set forth in substance and effect that the said trial Judge before whom the causes were set down for trial, had a personal bias or prejudice against petitioner, stating the reasons and facts in support therof, in accordance with law, and said affidavit of personal prejudice or bias being signed by petitioner "In Propria Persona," duly subscribed and sworn to by said petitioner on the date of the filing of same (R. 1027-1032), June 20th, 1940.

The Clerk of the trial court subsequently refused to accept said affidavit of petitioner setting forth the personal prejudice and bias of the trial Judge, for the reason that it was not accompanied by a certificate of counsel, and that the same, though presented in open court thereafter, on the 28th of June. 1940, by

the Clerk of the court, was not recorded as filed upon instruction of the trial court (R. 1036).

On the 28th day of June, 1940, the date of arraignment, and three days prior to the date set for trial, July 1st, 1940, petitioner presented to the trial court a motion (R. 1033-1035) to the effect that he had filed said affidavit of personal bias and prejudice on June 20th, 1940, as aforesaid, but that the Clerk of the court subsequently notified him he would not accept the filing of same by virtue of the absence of a certificate of counsel on said affidavit; and, in said motion presented by petitioner on that date, the 28th of June, 1940, petitioner further averred under oath that he had no attorney, said motion being signed: "Charlie Beland, Defendant, and Attorney in his own behalf."

The trial court thereupon summarily denied petitioner the right to file said affidavit of personal bias and prejudice because the same did not have attached thereto certificate of counsel (R. 1037-1041).

Petitioner was without counsel representing him on the affidavit of personal bias and prejudice; stated in said affidavit his inability to employ counsel to present said affidavit in his behalf; averring further in said affidavit that counsel in the Northern District of Texas feared the trial Judge because of the trial Judge's action in another case involving petitioner and petitioner's counsel of record, and petitioner recited that he was compelled to represent his own cause insofar as the affidavit and motion was concerned, and, in fact, did represent himself in his own proper person

and as his own counsel in said summary hearing, the trial Court permitting petitioner to save exceptions to the Court's ruling denying him the right to file said affidavit of personal bias and prejudice (R. 1037-1038-1041).

Subsequently, on July 8th, 1940, the cause came on for trial, and on July 18th, 1940, petitioner was found guilty of Counts 16, 18, and 42 of the indictment, and not guilty on the remaining counts. Counts 16 and 18 charged substantive violations of the narcotic laws, and Count 42, as mentioned *supra*, charged a conspiracy to violate the said laws.

After conviction, and before sentence was pronounced, petitioner filed, on the 18th of July, 1940, his motion for an arrest of judgment (R. 61-62), which was overruled by the trial Court and exception duly taken (R. —).

Thereafter, on the 19th of July, 1940, petitioner gave notice of appeal under Rule III (R. 88) setting forth the grounds of appeal (R. 89-90), and thereafter filed his appeal bond (R. 98).

The cause in the United States Circuit Court of Appeals for the Fifth Circuit was styled: "Charles Beland and Bert Barkley vs. United States of America," No. 9601.

The judgment and sentence of the trial Court as to petitioner was that he serve 5 (five) years in an institution to be designated by the Attorney General, generally on Counts 16 and 42 of the indictment, and that he serve 10 (ten) years imprisonment on Count

The judgment and sentence of the trial court as to petitioner was reversed by the Fifth Circuit Court of Appeals as to both Counts 16 and 18 of the indictment, i. e., the substantive offenses, but the conviction on Count 42, the conspiracy charge, was affirmed; hence, this petition for a writ of certiorari is limited to Count 42 of the indictment.

18 of the indictment, said latter sentence to be suspended (R. 80-81).

On the 2nd day of January, 1941, petitioner made application to the Fifth Circuit Court for leave to appeal from the judgment and sentence of the trial Court without having the record printed (R. 1018-1019), and in accordance with the caption of the Clerk of the Fifth Circuit Court of Appeals (R. Vol. I) it is to be noted that petitioner's appeal was considered upon the transcript of record filed in the case of *Chadwick vs. United States of America*, No. 9639, (5th C. C. A.).

On the 2nd day of January, 1941, petitioner filed with the Fifth Circuit Court of Appeals his motion for amplification of the record, setting forth therein that he had filed, in his own behalf, with the Clerk of the trial Court, on June 20th, 1940, an affidavit of personal bias or prejudice directed against the trial Judge, praying the said trial Judge's recusation, and that the Clerk of the trial Court subsequently refused to accept the same for filing, and that thereafter, petitioner filed a motion with the trial Court on June 28th, 1940, setting forth the facts with reference to the filing of said affidavit of personal bias and prejudice, and that thereafter petitioner was denied the right to file said affidavit, was thereafter tried and convicted, as hereinbefore set forth. Petitioner, in said motion to ampify the record, prayed the Fifth Circuit Court of Appeals to order sent up from the trial Court to the Circuit Court of Appeals said affidavit, motion, and a transcript of the sum-

mary hearing of June 28th, 1940, which application of petitioner was granted by the Fifth Circuit Court of Appeals on the 7th day of January, 1941 (R. 1020-1025).

The Fifth Circuit Court of Appeals based its affirmance of the judgment and sentence of the trial Court as to Count 42 of the indictment substantially on the following grounds: (1) That the evidence showed that petitioner was in close and constant contact with the other conspirators; that his name appeared on the books of the New York Syndicate; that he sought out and gave his co-conspirators the name and addresses of prospective customers and generally that the trial Court properly refused to instruct a verdict of Not Guilty as to petitioner under the evidence as to Count 42; (2) That the evidence failed to show that petitioner was guilty of the charges contained in Counts 16 and 18; (3) That the affidavit of *personal bias or prejudice* against the trial Judge filed by petitioner and signed "Charles Beland, In Propria Persona," was not accompanied by certificate of counsel; that at a hearing of preliminary matters, petitioner presented a written motion signed "Charles Beland, Defendant, and Attorney in his own behalf," in which motion petitioner asked the Court to consider his affidavit and permit it to be filed; that petitioner had two counsel of record and that the attorney who tried the case below was present in court and conferred with petitioner but said counsel declined to certify to the affidavit and stated he was not representing petitioner on the motion; that there was no merit in petitioner's contention that he was representing

himself and that said affidavit was insufficient in that it presented no facts showing personal prejudice or bias on the part of the trial Judge and that the allegations therein did not satisfy the statute designed to disqualify the judge because of *personal bias and prejudice.*

Judgment of the Circuit Court of Appeals was entered on the 27th day of February, 1941 (R. 1048), and petition for rehearing was duly filed on March 19th, 1941, (R. 1049 *et seq).* Order denying petition for rehearing was entered by the Fifth Circuit Court of Appeals on March 20th, 1941 (R. 1058). Motion for stay of mandate was duly filed by petitioner on March 31st, 1941, (R. 1059-60) and order granting the same for a period of thirty days from March 20th, 1941, was entered by the Circuit Court of Appeals on March 31st, 1941 (R. 1061).

The specification of errors and points relied upon in the appeal from the trial Court to the Fifth Circuit Court of Appeals, and herein involved, are as follows:

1.

The trial Court erred in denying petitioner the right to file his affidavit of personal prejudice and bias against the trial Judge.

2.

The trial Court erred in failing and refusing to pass upon or test the legal sufficiency of the affidavit of personal bias or prejudice filed by petitioner.

3.

Certificate of counsel to said affidavit of personal bias or prejudice was not necessary, petitioner having no counsel.

4.

The affidavit of petitioner to disqualify the trial Judge was sufficient under the law.

5.

The judgment and sentence of the trial Court as to Count 42 of the indictment was, and is, contrary to the law and the evidence.

———o———

II.

Reasons Relied on for Allowance of the Writ

(1) The decision of the Circuit Court of Appeals herein involves an important question of Federal Law, and is an erroneous decision on an important question of general law which is in conflict with the weight of authority.

(2) The decision of the Circuit Court of Appeals herein involves an important question of Federal Criminal procedure which is in conflict with the decisions of this Court.

(3) The decision of the Circuit Court of Appeals herein is a decision of a Federal question under the

Constitution and the statutes of the United States, violative of the constitutional rights of petitioner.

(4) The decision of the Circuit Court of Appeals herein is one in direct conflict with the provisions of the Constitution of the United States, and the amendments thereto, the laws of the United States thereunder, and the decisions of this Court.

(5) The decision of the Circuit Court of Appeals herein involves an important question of Federal Law, both adjective and substantive, which has not been definitely settled, but should be settled by this Court.

(6) The decision of the Circuit Court of Appeals so far departs from the accepted record and usual course of Federal judicial proceedings, and is an erroneous action and decision of an important question of general law in conflict with the weight of authority, and in a way probably in conflict with applicable decisions of this Court, such as to call for an exercise of this Court's power of supervision.

(7) The decision of the Circuit Court of Appeals herein is in conflict with the decisions of other Circuit Courts of Appeals for other circuits on the same matter.

(8) The judgment of the Circuit Court of Appeals herein in simply affirming the judgment of conviction on the 42nd count as to petitioner, wherein petitioner had received the maximum sentence on Count 16 of the indictment, together with said 42nd count of the indictment, is contrary to law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript and of the proceedings of the said Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket, No. 9601, "Charles Beland and Bert Barkley, v. United States of America," to the end that this case may be reviewed and determined by this Court as provided for by the statutes and laws of the United States of America; and that the judgment herein of the said United States District Court for the Fort Worth Division of the Northern District of Texas, and the United States Circuit Court of Appeals for the Fifth Circuit affirming that judgment as to Count 42 of the indictment on which petitioner herein was convicted and sentenced, be reversed by this Court and that said petitioner be discharged and for such other and further relief as to this Court may seem proper.

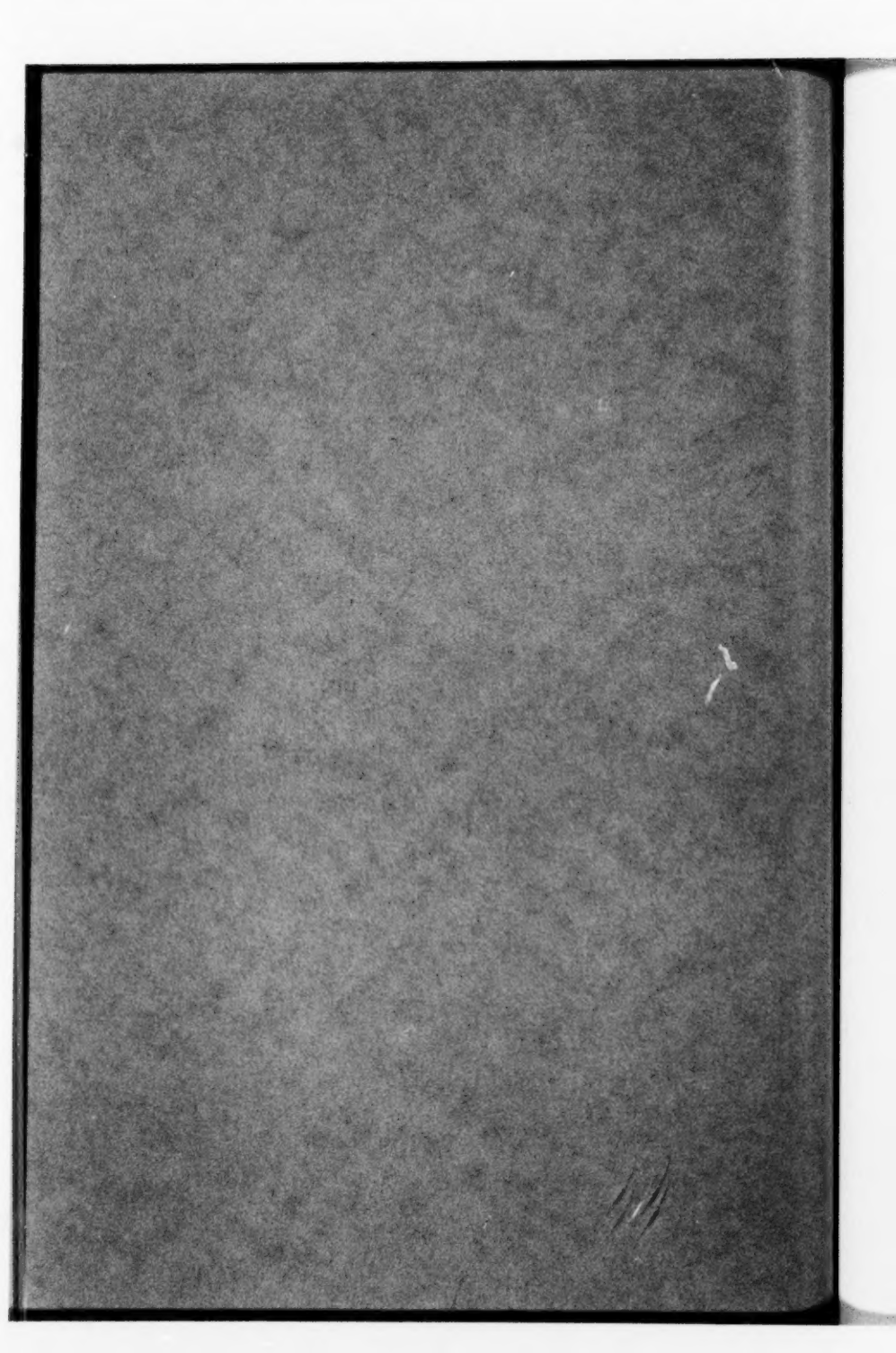
Dated this 15th day of April, 1941.

J. FOREST McCUTCHEON,
1005 Texas Bank Building,
Dallas, Texas.

CERTIFICATE OF COUNSEL

I hereby certify that I have carefully examined the record and, in the light of its contents, consider the Petition for Writ of Cetriorari well founded, and that it is not interposed for purpose of delay.

J. FOREST McCUTCHEON,
Attorney for Petitioner.



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No. 966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

CHARLES BELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief of Petitioner in Support of Petition for Writ of Certiorari

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit herein was rendered on the 27th day of February, 1941, and is set forth in the record at Pages 1043-1047. (We do not understand that the same has as yet been officially reported.)

II.

Jurisdiction

(1) The judgment of the Circuit Court of Appeals for the Fifth Circuit, sought to be reviewed herein, insofar as the same is applicable to the conviction,

sentence, and judgment as to the 42nd count of the indictment, is dated and was entered on the 27th day of February, 1941 (R. 1048). Petition for rehearing was duly filed in said Circuit Court of Appeals on the 19th day of March, 1941, (R. 1049-1057), and the same denied by the Circuit Court of Appeals on the 20th day of March, 1941 (R. 1058).

(2) The statutory provisions which sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, Sec. 347, Title 28 USCA.

(3) The cases and authorities which sustain said jurisdiction, among others, are as follows:

Boyd v. United States, 116 U. S. 616;
Russell v. Southard, 12 How. 139, 158, 159;
Warner v. New Orleans, 167 U. S. 467;
Patton v. United States, 281 U. S. 276;
United States v. Gulf Refining Co., 268 U. S. 542;
United States v. Young, 232 U. S. 155.

(4) The decision of the Fifth Circuit Court of Appeals affirming the judgment of the trial court as to the 42nd count of the indictment, and holding that petitioner did have legal representation as to the filing of the affidavit of personal bias and prejudice, and the filing of the motion in support thereof, and that the evidence sustained a conviction on the 42nd count of the indictment, was a decision inharmonious and dissonant with the record of the proceedings summarily had as to the affidavit filed by petitioner and his motion in support thereof and with the record of

the trial, contrary to the weight of authorities, contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, contrary to the Sixth Amendment to the Constitution of the United States and applicable decisions of this Court, and in conflict with decisions of other Circuit Courts of Appeals for other circuits, and such a departure from the accepted and usual course of judicial proceedings, both in the court below and on appeal, and such an erroneous action and decision in conflict with the weight of authorities, the laws of the United States, and in conflict with applicable decisions of this Court, as to bring the case within the jurisdictional provisions relied upon herein.

III.

Statement of the Case

The statement of the case has already been summarized and set forth in the preceding petition under I, "*Summary Statement of Matters Involved,*" which, for the sake of brevity, is hereby adopted and made a part of this Brief, excepting, however, the inclusion in this Brief, fully set forth in the appendix, of that part of the record below, to-wit, the affidavit of personal bias and prejudice, the motion filed in support thereof, and the record of the summary proceedings had on June 28th, 1940, the latter dealing with the trial court's action on the hereinbefore mentioned affidavit and motion in support thereof; these latter inclusions within this Brief in the appendix being

deemed advisable so that this Court may have before it for reference purposes this pertinent and unusual record of what occurred in the trial court prior to and on June 28th, 1940.

Petitioner respectfully shows that on June 20th, 1940, pursuant to the provisions of the statute, Sec. 394, Title 28, USCA, and Sec. 25, Title 28, USCA, the prepared and seasonably presented for filing, and did file on that date with the Clerk of the court an affidavit of personal bias or prejudice directed against the trial Judge, the Hon. T. Whitfield Davidson. Sec. 394, Title 28 USCA, provides:

> "In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said court, respectively, are permitted to manage and conduct causes therein."

Section 25, Title 28 USCA, provides:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court,

or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action. (March 3, 1911, c. 231, §21, 36 Stat. 1090.)"

The record shows (R. 1036) that subsequent to petitioner filing with the Clerk of the court the said affidavit of personal bias or prejudice, the Clerk notified petitioner that the affidavit had not been recorded as filed; the Clerk certifying that his action was predicated *upon the order of the United States Attorney* to the Clerk, "beca ıse the affidavit was not certified to by a lawyer," notwithstanding the fact that no lawyer of record was on file for petitioner, and petitioner had duly signed, and certified to the affidavit as counsel acting in his own proper person.

It is to be noted herein, that on the date of petitioner's filing the said affidavit, the date set for trial was eleven days hence, namely, July 1st, 1940, and that petitioner had complied with the statute governing the filing of such affidavits within the ten days period set out therein under the statute. Upon the notification to petitioner by the Clerk of the court concerning the refusal by the Clerk to file the said affidavit, petitioner prepared a motion in support thereof

the filing of the said affidavit, for presentation to the trial Court on the date set for arraignment, namely, June 28th, 1940, signing the same as "Attorney in his own behalf."

Thereafter, petitioner succeeded in engaging counsel to represent him contingent on the action of the trial Court on June 28th, 1940, as to the affidavit of personal bias and prejudice and the motion in support thereof, to present and argue the customary and usual dilatory motions, namely, motions to dismiss, to strike, and to sever.

Petitioner respectfully shows that on June 28th, 1940, before being arraigned on the several indictments docketed against him, the matter of the affidavit of personal bias and prejudice and the motion in support thereof came on to be heard. The record shows that the trial court immediately subjected petitioner to examination not as to the sufficiency of the affidavit of personal bias and prejudice, and the validity of the said motion in support thereof, but as to the filing of same by petitioner acting in his own behalf, and judicially attempted (with the aid of counsel for the United States) to controvert the affidavit by *direct and indirect attack*, and at one and the same time both denied the petitioner the *right to file the said affidavit and motion in support thereof* while acting as his own counsel, as being *improperly filed;* yet judicially recognized petitioner as counsel for himself, and recognized Counsellor Smith as not being counsel for the petitioner in that summary proceeding, as the record abundantly shows herein. (R. 1038-1041.)

Quoting from the record, the attention of the Court is called to the following portion thereof had before the trial court in the summary hearing of June 28, 1940, wherein the petitioner was called to testify by the court as to the truth and sufficiency of his affidavit of personal bias or prejudice on the part of the trial judge, the trial judge not being satisfied to test the legal sufficiency of said affidavit but by implication compelling petitioner to take the witness stand in his own case as a defendant in a criminal case, and in which proceeding the following appears from the record; (See Appendix):

> "The witness, CHARLES BELAND, having been first duly sworn, testified as follows:
>
> THE COURT: I think perhaps you ought to have a guardian to save yourself from walking deliberately into making a false swearing in court.
>
> A. Well, your Honor, I will solemnly swear that every one of these words of this affidavit to be the truth, as far as I know and believe."

Petitioner further shows to this Court that following the action of the trial Judge on June 28th, 1940, that the cause came on for trial on July 8th, 1940, and on July 18th, 1940, petitioner was found guilty of Counts 16, 18, and 42 of the indictment. Petitioner thereupon duly filed a motion in arrest of judgment, on July 18th, 1940, and same being overruled, the trial Court sentenced petitioner to serve a period of five years generally on Counts 16 and 42 of the indictment, and ten years imprisonment on Count 18, the latter sentence being ordered suspended.

In its decision of February 27th, 1941, the Fifth Circuit Court of Appeals reversed the conviction of petitioner on Counts 16 and 18, and affirmed the judgment of conviction and sentence on Count 42. This cause is limited to the judgment and conviction of petitioner as to the 42nd count of the indictment.

—o—

IV.

Specifications of Errors

(1) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court properly denied petitioner the right to file the said affidavit of personal bias or prejudice directed against the trial Judge.

(2) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court properly tested the legal sufficiency of the affidavit of personal bias or prejudice.

(3) The Circuit Court of Appeals for the Fifth Circuit erred in holding that petitioner was represented by two counsel of record and was not acting as counsel in his own behalf.

(4) The Circuit Court of Appeals for the Fifth Circuit erred in holding there was sufficient evidence to support a verdict of guilty as to the 42nd count of the indictment.

(5) The Circuit Court of Appeals for the Fifth Circuit erred in not reversing the judgment of con-

viction because of the inflammatory and prejudicial remarks made by the United States Attorney in his summation to the jury, and for the failure of the trial court to declare a mistrial when timely and properly objected to by petitioner.

(6) The Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment and sentence of the trial court as to the 42nd count of the indictment.

(7) The Circuit Court of Appeals for the Fifth Circuit erred for other errors appearing in the record.

V.

Point A

(Specification of Errors Nos. 1, 2, and 3.)

The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court properly denied petitioner the right to file said affidavit of personal bias or prejudice directed against the trial judge, and the motion in support thereof, and that the trial court properly tested the legal sufficiency of the affidavit, and that it was insufficient in law, and that petitioner was represented by *two counsel* of record, and that petitioner was not properly before the trial court as counsel in his own behalf.

QUESTION PRESENTED

The question presented here for determination is whether a defendant in a criminal action has the right and privilege under the Fifth and Sixth Amendments to the Constitution of the United States, to plead and manage his own cause, where he is without legal representation, availing himself of statutory benefits under Sec. 25, Title 28 USCA.

Petitioner respectfully submits that the decision of the Fifth Circuit Court of Appeals was erroneously bottomed, and that the record does not support the holdings of the said Circuit Court. The record shows that petitioner did *seasonably and timely* file the said affidavit of personal bias or prejudice; that petitioner availed himself of the right to act in his own behalf because he was without legal representation; that he was without counsel, and did act as his own counsel on June 28th, 1940, when he appeared before the trial Court to urge his motion in support of the affidavit filed by him on June 20th, 1940; and that his rights and privileges under the Due Process Clause of the Fifth Amendment to the Constitution of the United States were violated by the trial Court in that he was denied procedural due process.

In connection with the right to plead and manage one's own cause, as provided by Sec. 394, Title 28 USCA, *supra*, it was held in *Bocz v. Hudson Motor Co.*, 19 Fed. Supp. 385:

> "Everyone has a right to appear in his own proper person and represent himself."

As the record shows, petitioner timely and seasonably filed the affidavit of personal bias and prejudice, only to be subsequently informed by a ministerial officer of the Court, to-wit, the Clerk of the Court, that the same was not recorded as filed on order of the United States Attorney (R. 1036). Petitioner submits that he was entitled to have his affidavit passed upon by a court of competent jurisdiction, and not by a ministerial officer of the Court.

Covering the duty of a Court in such matters, and the practice in connection with the filing of such papers, it is well to note the opinions of Courts of Appeals in the following cases: *Saunders v. Piggly Wiggly Corp.*, 1 Fed. (2d) 582; *American Brake Shoe Foundry Co. v. Interborough Rapid Transit*, 6 Fed. Supp. 215. In the Saunders case, *supra*, the Court held: "It is the duty of the district judge to test whether the motion is legally sufficient. * * *" In the American Brake Shoe case, *supra*, the Court held: "Practice is to permit the filing of affidavit for purpose of considering its timeliness and legal sufficiency, and then to order it stricken from record if insufficient, or to certify to withdrawal of judge if sufficient in law."

Petitioner submits that the trial Court was the only port of authority permitted by statute (and the applicable decisions thereon) to deal with the legal sufficiency of the affidavit. Certainly not a Clerk of the Court. Despite the attempt by the Clerk and the United States Attorney to circumvent petitioner's rights in filing the affidavit, the matter came on for

hearing, but the record shows said hearing was held in an arbitrary manner. Notwithstanding the views held by the Circuit Courts of Appeals, and this Court, covering the procedure in such matters, the trial Court summarily refused and denied petitioner the right of filing his affidavit without testing the legal sufficiency of the same.

Petitioner earnestly contends that *the nub of legality in any cause is that form of procedure which in no wise infringes on the rights of the parties.* This was the heart of this Court's decision in a recent case known as *Edwards v. United States*, 61 S. Ct. 673, wherein Justice Reed, speaking for the Court said: "Procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body."

The record abundantly shows that on June 28th, 1940, when petitioner appeared before the trial Court to urge his motion in support of the affidavit of personal bias and prejudice, that what occurred then could not, by any form of reasoning, be held to have been procedural due process affecting petitioner's cause. Petitioner found himself attacked, discredited, threatened with future criminal prosecution, his good faith impugned, harassed not only by the Court, but too, from counsel for the United States acting in open Court.

Nowhere in the proceedings of June 28th, 1940 is there found an attempt by the Court to pass upon and lawfully test the legal sufficiency of petitioner's affidavit of personal bias or prejudice.

On the contrary, petitioner's rights were challenged, trampled upon, ignored, all because he sought to exercise his Constitutional prerogative as counsel acting in his own behalf because circumstances were so contrived as to compel him to seek lawful relief based on honest beliefs and facts held by him, by his own advocacy.

Petitioner showed by his affidavit that he was a party to the series of actions then docketed against him, viz, four indictments; petitioner had filed the affidavit eleven days before the date set for trial, namely, July 1st, 1940; the trial had not commenced; delay of the trial was not involved, for the trial was postponed by the Court of its own motion from July 1st, 1940 to July 8th, 1940.

Wherein can it be held that petitioner was derelict in complying with the laws governing such matters? Acting as his own counsel, petitioner contends he had the right to certify that the affidavit was made in good faith. Was he then not entitled to have the said affidavit lawfully considered, as has been held so many times by various Courts of Appeals and this Honorable Court? What was said in *Morris v. United States*, 17 Fed. (2d) 831, and reiterated by the Court in *Henry v. Speer*, 201 Fed. 869, and in the Saunders case, *supra*, certainly applied to the instant case. In the Morris case, *supra*, the Court held:

> "It is not within the province of the trial judge to pass upon the good faith of the defendant making an affidavit of prejudice under this section."

As to the question of petitioner's good faith in filing the affidavit, what was said in *Flegenheimer v. United States*, 110 Fed. (2d) 379, deserves mention here. In that case, counsel's good faith was challenged. Petitioner had died. Counsel prosecuted an appeal to the Third Circuit to clear their names from aspersions made by the lower Court which were part of the record there. The Circuit Court held: "As long as the deceased (affiant in that proceeding) *honestly believed* that the judge was biased and stated on what facts he based his opinion, *it was his right to call on his counsel* to give the certificate provided by statute in order to have the question of bias determined." Altho the circumstances confronting petitioner in this case were of a slightly different character, petitioner did not have opportunity to *call upon his counsel to give the certificate*, because he had no counsel; and, being counsel in his own behalf, he gave a certificate in compliance with the provisions of the statute, as the record shows.

Wherein was there bad faith on the part of the petitioner?

Petitioner further respectfully shows that the record fully discloses he was not represented by counsel, or had counsel of record. Counsellor Smith, present in court on June 28th, 1940, stated to the Court he was not representing petitioner on the affidavit or the motion in support thereof; that he was to represent petitioner thereafter upon arraignment was implied in the colloquy that occurred during the hearing on petitioner's motion, in the event the Court adverse-

ly ruled on the motion for disqualification of the trial Judge. The record shows that the Court recognized Counsellor Smith's status, as revealed by the following; (See Appendix):

> "Mr. Smith: I would like the record to show that I am not representing Mr. Beland *on that motion.*"
>
> "The Court: *The Court understands Mr. Smith does not appear on this motion and will permit him to decline to appear.*"
>
> "Mr. Smith: May it please your Honor, in order to keep the record straight, Mr. Beland didn't tell me he wanted to testify. What he said was, to file some motion."
>
> "The Court: You might let it show that you do or do not appear for him."
>
> "Mr. Smith: *No, sir, I don't appear for him at all.*"

The record further shows the Court's ruling, and its contradictory import:

> "The Court: Mr. District Attorney. I will ask you to file, to dictate to the reporter some contest on this. I don't think it should be heard nor is entitled to be heard, *until some lawyer certifies to it and not having been certified to by any lawyer, and he having a lawyer who does not certify to it, the Court will dismiss the affidavit as the matter stands.*"

to which action of the Court the petitioner himself took timely objection, as revealed by the following:

"Mr. Beland: *Your Honor, can I take exception to the Court's ruling?*"

"The Court: You certainly may."

Thus, the record shows the Court accepted Counsellor Smith's statement *he was not petitioner's counsel on the motion*, and at one and the same time recognized petitioner's own representation of himself as counsel permitting him to act as counsel, challenging petitioner's certificate of good faith; in one ruling summarily disregarding and destroying petitioner's Constitutional rights and privileges.

Petitioner respectfully submits that the affidavit involved herein merited the judicial holding of legal sufficiency. Petitioner concedes that some Circuit Courts of Appeals have drawn fine lines of distinctions as to what constitutes the legal sufficiency of an affidavit of personal bias or prejudice, and the construction of the statute involved, Sec. 25, Title 28 USCA. Some Courts have held the statute must be strictly construed in order to protect against abuses of the same. Other Courts have liberally construed the statute. Certain decisions approved affidavits filed on mere information and belief, while other decisions showed such affidavits filed on information and belief rejected. In *Berger v. U. S.*, 255 U. S. 22, it was held that an affidavit may be filed on information and belief; and to the same effect held by the Courts in *Nations v. U. S.*, 14 Fed. (2d) 507, cert. den. 273 U. S. 735, 71 L. Ed. 866; and in *Chafin v. U. S.*, 5 Fed. (2d) 592, cert. den. 269 U. S. 550, 70 L. Ed. 407.

In the Nations case, *supra*, Judge Booth, writing

for the Court, held: "We do not think that the affidavit need be so drawn as to fulfill the technical requirements of an indictment." There the affidavit was made on mere information and belief, stating facts straightforwardly and honestly, although considerably vague in essence and content, yet the affidavit was upheld by the Court. In the Chafin case, *supra*, the facts were more substantially grounded, and the affidavit, though somewhat scandalous as to content, was upheld in a lucid and informative decision.

In the instant case, the circumstances moving petitioner to compose and file the affidavit were unusual, but substantially grounded, and not of a scandalous nature. His fears stated by him were tangible and real because he, and members of his family, feared the trial Judge and for good cause (see affidavit set out in appendix). Petitioner's fears had become aggravated with the passage of time, not lessened; his fears had never become dormant, and were not suddenly revived by him to be used as a subterfuge to avoid being tried by Judge Davidson. The record abundantly illustrates that everything petitioner feared about the trial Judge, and predicted by him that might befall him if tried by the trial Court against whom the petitioner directed his affidavit, *did befall him.*

The record shows Judge Davidson sentenced petitioner on two counts, 16 and 18, where no evidence was shown against petitioner, after overruling a motion in arrest of judgment which clearly pointed out to the Court the error of the jury's verdict as to these

two counts; these sentences imposed on the two counts in question being reversed by the Circuit Court. Rulings made throughout the trial by the Court, affecting petitioner, were made in favor of petitioner's opponent with constant regularity. The record speaks for itself far more forcefully than petitioner can here inscribe.

We contend that petitioner predicated his affidavit of personal bias or prejudice upon tenable and substantial premises, and that the trial Court, prejudiced against the petitioner, and in favor of the petitioner's opponent, denied petitioner a fair and impartial trial as guaranteed him by the Constitution of the United States and the amendments thereto.

Petitioner earnestly submits that the Fifth Circuit Court of Appeals did not carefully examine, and did not carefully analyze the affidavit of personal bias or prejudice filed by him, and did not give analytical consideration to the background of the said affidavit which it merited. For, had the Circuit Court done so, the inescapable conclusion would have been that the affidavit was legally sufficient; and with the record of the summary hearing of June 28th, 1940, before it, together with the record of the proceedings of the trial, conviction, and sentence, to hold that petitioner's fears were not properly grounded as stated by him in his affidavit, and that the affidavit was insufficient, was to render a decision disregarding the record, and bottoming its opinion upon grounds not in the record.

Point B

(Specification of Errors Nos. 4, 5, and 6.)

The Circuit Court of Appeals for the Fifth Circuit erred in holding there was sufficient evidence to support a verdict of guilty as to the 42nd count of the indictment, and in not reversing the judgment of conviction for the failure of the trial court to declare a mistrial as was asked because of the inflammatory and prejudicial remarks made by the United States Attorney in his summation to the jury, and in affirming the judgment and sentence of the trial court as to the 42nd count of the indictment.

Petitioner respectfully directs the attention of this Honorable Court to that part of the Circuit Court's decision wherein the evidence adduced against petitioner was commented upon. The Court said: "The evidence shows without dispute that Beland was in close and constant contact with the other conspirators; his name appeared on the record books of the New York Syndicate; he sought out and gave his co-conspirators the names and addresses of prospective customers; he gave information as to who was presently in possession of heroin and where it could then be found; *he gave heroin to the Blakeleys* and informed them that his co-conspirator Ross had gone to their home to sell them heroin which had just been procured from New York. The existence of a conspiracy may be shown by *inference and circumstantial* evidence and any substantial knowledge and participation in a conspiracy will justify a verdict of guilty."

A careful examination of the record and the analysis in the record of the individual counts and the overt acts listed, shows that petitioner did not participate in the formation of the general conspiracy, alleged to have been formed in the summer of 1937. The overt acts pleaded shows that eighteen months after the formation of the conspiracy, petitioner allegedly entered the conspiracy (in 1939), allegedly acting in concert with the Blakeleys, touching only on the 40th and 41st counts of the indictment. These latter two counts directly charged petitioner with giving away, or dispensing, to the Blakeleys, a small quantity of heroin. The evidence shows further that petitioner did not *conspire to give away*, or *to dispense*, the said heroin in question; and the record shows *that the jury acquitted petitioner of the commission of these two substantive charges, namely, the 40th and 41st counts of the indictment.*

Petitioner respectfully shows that the Circuit Court in its decision held that: "Beland's conviction on Counts 16 and 18 *is not supported by the evidence*, and no sentence should have been assessed on these counts." Thus, petitioner stood acquitted by the jury in Counts 1 to 15 inclusive, Count 17, and Counts 19 to 41 inclusive; and the Circuit Court's reversal of the conviction on Counts 16 and 18 found petitioner acquitted of all of the substantive charges, Counts 1 to 41 inclusive because the record and the evidence showed he was not a party to the commission of these substantive offenses; directly or indirectly as an aider or abettor, or principal; and lastly, *not even a party to the conspiracy to commit these offenses.*

There is some testimony in the record that petitioner talked with the Blakeleys concerning a visit one Ross made to the Blakeleys' home. However, such a conversation with the Blakeleys bore no relation to any of the substantive offenses set out in Counts 1 to 41 inclusive. The record further shows, that Ross, the main government witness and informer, and Ross' wife, exonerated petitioner from participation in a general conspiracy to commit the substantive offenses charged in Counts 1 to 39 inclusive, and that petitioner neither aided nor abetted the commission of these offenses.

Petitioner earnestly submits that the record as a whole shows that at most he was *inactively acquiescent* of the so-called general conspiracy; that he was included as a defendant by the pleader as a conspirator, dispenser of drugs to the Blakeleys, because the draughtsman drew an all-embracing *dragnet conspiracy charge*, naming individuals within, and without the district wherein the substantive offenses were charged to have been committed, merely because some of the principal actors in the general conspiracy, and some of the principal violators of the offenses charged, at some time or another came in contact with petitioner on occasions during said period of time laid in the indictment; and conversed about matters bearing no relation to the charges in the main, as herein discussed.

The Circuit Court in its decision held: "There was abundant evidence upon which the jury *could* have based conviction of Beland on *certain* substantive counts of the indictment." We respectfully contend

that this conclusion of the Circuit Court completely ignored the testimony and the record. Mere *inactive acquiesence*, acquaintance with some of the members of the general conspiracy, did not and does not prove petitioner guilty of conspiracy, and the record so supports petitioner's contentions as argued herein. We submit that in the instant case, "conspiracy, that darling of the modern prosecutor's nursery" (Judge Hand in *Harrison v. United States*, 7 Fed. (2d) 259), was used and abused by the pleader; that to conclude petitioner was guilty of conspiracy as charged in the 42nd count of the indictment, the Circuit Court pursued a strained and tortuous analysis of the record and the evidence.

Petitioner further respectfully shows that the Circuit Court in its decision disregarded the record showing the failure of the trial court to declare a mistrial as asked for, when the United States Attorney, in his summation to the jury, stated: "You talk about they have got him here under guard *** yes, he is under guard so some of you fellows won't kill him before he testifies," such statement being timely objected to by counsel as being highly inflammatory and prejudicial.

The trial Court ordered the remark stricken from the record, and instructed the jury to disregard the same. We earnestly contend that the ruling by the Court could not, and did not cure the harmful effect of the United States Attorney's remark on the minds of the jury. The record shows the United States Attorney did not withdraw the remark. The decision

of the Circuit Court shows it gave no consideration to this phase of the case, although argued in the brief below by petitioner, sufficiently explicit to inform the Circuit Court.

Petitioner respectfully submits that such inflammatory and prejudicial remarks can not be erased from the minds of the jury by mere order of the trial Court. The mind of the layman is a catch-all, sponge-like, highly receptive. Under the circumstances attendant that act of misconduct on the part of the United States Attorney, with the witness before the jury, starkly and startlingly voicing such remarks, is it reasonable to believe that the mere order of the trial Court to disregard the statement by the United States Attorney could possibly erase the harmful, prejudicial, and inflammatory effect so suddenly created? Jurors are human; they are but average laymen called upon to judge the facts, appraise evidence, analyze the demeanor of witnesses and defendants, to segregate in their minds highly technical propositions governing law, facts, and the reason of things generally; buffeted first one way, and then another, by counsel for the government, and by counsel for the defense. Their human predilections necessarily must come to the fore; jurors can not be held to possess extraordinary and exceptional evenness of temper; calm and dispassionate mental powers and processes of such an extraordinary nature as would remove them from the ken of ordinary human beings. It must be remembered that jurors, untrained in the ways of law and evidence can not be expected to have the same judicial bent of mind as those trained in the

law, and those experienced in its intricacies and involvements. To maintain the rule that the harmful effects of such inflammatory and prejudicial remarks are curable upon the order of the Court, is to continue in force a rule that is obsolete, irreconcilable with modern day logic and psychological analysis of things and men, and the mind. See *Holt v. United States*, 94 Fed. (2d) 90. (C.C.A. 10th.)

Such inflammatory and prejudicial references concerning defendants was held to be prejudicial error in *U. S. v. Sprengel*, 103 Fed. (2d) 876, and in *U. S. v. McNamara*, 91 Fed. (2d) 986; and in *Berger v. U. S.* 295 U. S. 78, 79 L. Ed. 314, the judgments of convictions and sentences in the aforementioned cases being ordered reversed because of the misconduct of the district attorneys in those cases.

Conclusion

We respectfully submit that the decision of the Circuit Court of Appeals for the Fifth Circuit was and is in conflict with the decisions of other Circuit Courts of Appeals, and this Honorable Court; that the same involves important questions of Federal Law and is an erroneous decision not in keeping with the record herein involved, in conflict with the weight of authority and the applicable decisions of this Court, and that the writ of certiorari prayed for herein should be granted.

Therefore, petitioner respectfully submits that for the reasons hereinbefore stated, this cause is one calling for the exercise by this Court of its supervisory

powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision and judgment of the Circuit Court of Appeals for the Fifth Circuit.

J. FORREST McCUTCHEON,
1005 Texas Bank Bldg.,
Dallas, Texas,
Attorney for Petitioner.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

UNITED STATES OF AMERICA
VS.
CHARLES BELAND Et Al

No. 7077
No. 7484
No. 7485
No. 7486

AFFIDAVIT OF PERSONAL PREJUDICE AND BIAS OF JUDGE

Now comes Charles Beland, sometimes referred to as Charley Beland, defendant in the above numbered causes, and avers and on oath says that the Honorable T. Whitfield Davidson, United States District Judge in and for the United States District Court, Fort Worth Division, of the Northern District of Texas, the judge before whom these actions and proceedings are to be tried, has a personal bias and prejudice against him. For a statement of the facts and reasons for the belief on the part of the said defendant that such bias and personal prejudice against him on the part of the said Honorable T. Whitfield Davidson, the judge before whom these actions and proceedings are to be tried, exists, defendant avers the following:

(1) Prior to the defendant being indicted in cause No. 7077, sometime during March, 1938, an informer, one Ardell Savage, acting under the direction of one W. H. Crook, Chief Narcotic Inspector in Fort Worth, Texas, informed defendant that she had gathered numerous reports covering alleged violations of the Harrison Anti-Narcotic Act, attributed to divers persons including members of the defendant's family and the defendant and, that she, in company with the said W. H. Crook, Mr. Shifflet, a police officer of the City of Fort Worth, and Clyde O. Eastus, United States Attorney, Mr. Barnett, a Narcotic Inspector, and Mr. Robinson, a Narcotic Inspector, had, on several occasions discussed the ramifications of the case as then being prepared against the hereinbefore mentioned defendants and this defendant, and that on one occasion, she Ardell Savage, in company with either all of the parties mentioned hereinabove, associated together in the preparation of the case against the defendants and this defendant, or some of the parties mentioned heretofore who were then in the employ of the United States and preparing the cases, discussed together with the said Honorable T. Whitfield Davidson, including the informer, Ardell Savage, the punishment that would be assessed upon a conviction of these several defendants, and this defendant particularly, the exact number of years to be assessed against Charles (Charley) Beland, twenty-five years imprisonment in a United States Penitentiary, with especial emphasis having been stated that Charles (Charley) Beland would be confined to Alcatraz Prison; and, that other conversations relating to the

then pending and prepared case against the defendant's family and himself covered other phases which she, the informer, Ardell Savage, could not remember.

(2) That upon so being informed by the informer, Ardell Savage, as to what had been discussed by the said employees of the United States, and the said Honorable T. Whitfield Davidson, concerning the case generally and the possible terms of sentence that might eventuate, that the defendant's family, availed themselves of the remedy at law, namely, by the filing of an affidavit of personal bias and prejudice against the said Honorable T. Whitfield Davidson, which was duly passed upon and wherein the said Honorable T. Whitfield Davidson recused himself from presiding upon the trial of the persons charged in this case, namely, defendant's family, excepting himself, the defendant not having been in the jurisdiction of the Court at the time, and that such proceedings as were had then were before the Honorable James C. Wilson, United States District Judge, at Fort Worth, Texas.

(3) That subsequent to the filing of the said affidavit of personal bias and prejudice during the March term, 1938, considerable publicity developed from the filing of the said affidavit, and counsel then representing the defendant, and defendant's family, was ordered to show cause why he should not be disbarred from the rolls of the said Court, said order being made by the said Honorable T. Whitfield Davidson; resulting in considerable doubt and suspicions being directed against defendant's then employed counsel,

and other retaliatory measures resorted to on the part of agents of the United States in connection with the information supplied defendant's family, and this defendant, by Ardell Savage, the informer employed by the agents of the Narcotic Department to assist and prepare the cases then before the court; and, that the said Honorable T. Whitfield Davidson caused the defendant's former counsel to defend himself against disbarment from the rolls of attorneys practicing in the United States District Court for the Northern District of Texas, on the erroneously conceived idea that defendant's counsel at that time caused, or had aided, the conception of the affidavit of personal bias and prejudice, when in truth and fact the same was all brought about by the information, however factual or not it may have been, relayed and addressed personally on the part of the informer for the United States, Ardell Savage, to the defendant and his family and other defendants charged in that cause, and which information brought forth within each of the defendants minds, and this defendant, a mental fear of being tried before the Honorable T. Whitfield Davidson, and what might be visited upon them in the form of punishment should a conviction result.

(4) This defendant avers that such a fear as to the impartiality and fairness of the said T. Whitfield Davidson, as a Judge of the United States District Court, to try any case wherein this defendant is accused of an offense against the United States, is a fear that has not been displaced by any of the events or proceedings subsequent to the filing of the original affidavit of personal bias and prejudice during the

March term, 1938; but, on the contrary, such fear is aggravated by other circumstances, wherein the said T. Whitfield Davidson, Presiding in other cases wherein similar offenses were charged against other defendants, has imposed sentences that are harsh, cruel, and excessive, as was the result in a case known as United States versus Ginsberg, et al, where sentences as long as 52 years was imposed by the said T. Whitfield Davidson, upon a defendant over 50 years of age, such a punishment being a sentence far more aggravated than a life sentence; and, that such a result as obtained in the Ginsberg case, which was tried before the Honorable T. Whitfield Davidson prior to the return of an indictment against this defendant, together with the information supplied him and others by Ardell Savage, could have had but reception within this defendant's mind, and still exists as a live fear as to what might be visited upon him in the form of punishment should a conviction result before a court presided over by the Honorable T. Whitfield Davidson.

(5) This defendant avers that subsequent to the disposition of the disbarment proceedings against defendant's then employed counsel, this defendant came within the jurisdiction of this Honorable Court, and successive delays were had in connection with the trial of this cause, No. 7077; and, that latterly, the Honorable T. Whitfield Davidson had occasion to pass the said cause to the court presided over by the Honorable James C. Wilson, senior District Judge for the Northern District of Texas; and, that up to the filing of this affidavit of personal bias and prejudice against

the Honorable T. Whitfield Davidson, there had been no submission of this defendant to the jurisdiction of the court presided over by the Honorable T. Whitfield Davidson up to the present time, he having been absent at the time of the filing of the affidavit of personal bias and prejudice, which occurred during the March term, 1938, and which affidavit was then filed by defendant's mother, Lucy Beland, his brother, Joe Beland, and his sister-in-law, Jacqueline Beland, and acted upon as hereinbefore recited.

(6) That this affidavit of personal bias and prejudice against the Honorable T. Whitfield Davidson is not made for the purposes of delaying any proceeding wherein this defendant may be named defendant, but is filed in good faith and by virtue of the ever present fears that resides within his mind concerning the fitness, fairness, and partiality of the said T. Whitfield Davidson to preside in any case wherein this defendant is named as a defendant; and further, that by virtue of the measures resorted to by the said T. Whitfield Davidson in causing proceedings to be instituted against counsel formerly employed by him, evidences a frivolousness of judicial conduct, and an intent to visit upon others punishment not fairly or legally due to be visited upon anyone, especially counsel who was acting in good faith and attempting to protect the interests of his clients at that time; and this defendant is of the belief, and the feeling, that however the Honorable T. Whitfield Davidson may, or may not condone the acts of others especially those who might unfortunately be charged with offenses against the United States, that his particular

attitude, judicially, against persons charged with violations of the Harrison Anti-Narcotic Act has been intemperate, unfair, and hardly in keeping with judicial mercy and temperateness as demonstrated by him not only in the Ginsberg case, but in other cases where similar violations of the law were tried, and by his expressions from the bench during the proceedings wherein such cases were tried by him; and, by virtue of natural causes and natural feelings that normally ensue, illustrated by the said T. Whitfield Davidson's actions against defendant's former counsel, and the present wide publicity covering the cases wherein defendant is now charged with offenses against the United States, and these offenses being alleged violations of the Harrison Anti-Narcotic Act and alleged conspiracies, that all of these facts are still resident and secure within the mind of the said T. Whitfield Davidson, as would ordinarily prejudice him against this defendant should defendant be tried before the Honorable T. Whitfield Davidson.

That this affidavit is filed ten days before the date certain set for the trial of these causes, namely, June 20th, A. D. 1940, covering the filing of this affidavit of personal bias and prejudice, and the date certain set for trial being July 1st, A. D. 1940.

Wherefore, this defendant prays that another Judge shall be designated in the manner prescribed in Section 24, of Title 28, or Section 27 of said Title 28, United States Code (Judicial Code Section 23).

CHARLES CHARLEY BELAND
Charles (Charley) Beland,
In Propria Persona.

Subscribed and sworn to by Charles (Charley) Beland, this 20th day of June, A. D. 1940.

BENNIE VALLIANT
Notary Public in and for Tarrant
(Seal) County, Texas

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION,

FORT WORTH, TEXAS.

UNITED STATES OF AMERICA
VS.
LOUIS SHERMAN, et al

No. 7077
No. 7484
No. 7485 Criminal
No. 7486

MOTION

TO THE HONORABLE, THE JUDGE OF SAID COURT:

CHARLEY BELAND, one of the defendants in the above styled and numbered cases, respectfully shows to the Court as follows:

That heretofore, on or about the 20th day of June, A. D. 1940, which was more than ten days before the

trial date for which any of the above cases had been set, this defendant on his own behalf delivered to the Clerk of this Court for filing a motion to disqualify the Honorable T. W. Davidson, before whom the above cases had been set down for trial, said motion being in the nature of an affidavit of personal bias and prejudice, to which motion and affidavit reference is here made for all purposes.

This defendant says that the above motion and affidavit was prepared by defendant personally; that at the time of filing said motion and affidavit defendant was without benefit of legal counsel by virtue of the fact that defendant's attorney who had been retained by defendant to represent defendant in these causes had refused to represent defendant in the preparation and filing of the aforesaid motion and affidavit and before the time of the filing of said motion and affidavit, defendant's attorney, to-wit: Harold H. Young, had withdrawn as counsel of record. Defendant shows further that he attempted to procure other counsel to prepare and file said motion and affidavit and also to prepare and file this motion, but has been unable to do so, and is now unable to secure the services of a lawyer to represent the defendant in any matter connected with the disqualification of the above named judge of this Court.

Defendant says that he followed the provisions of the statute governing the filing of such a motion and affidavit as was presented to the Clerk for filing in this case, except that the said motion and affidavit was of course not certified by defendant's attorney of record in the cause, for the reason that defendant

did not, at said time, have an attorney of record in said cause and was unable to procure the services of an attorney to handle the matter for him, or to prepare this motion.

Defendant says that several days after the above motion and affidavit was presented to the Clerk for filing, the defendant was informed by the Clerk of this Court that Clyde O. Eastus, United States Attorney for this district, had ordered the Clerk not to file the motion and affidavit, assigning as his reason the fact that the motion and affidavit was not certified to by an attorney of record in accordance with the statute.

Defendant says that the above motion and affidavit was prepared and offered for filing by defendant in good faith, and not for the purpose of delaying the trial of the case; that the facts stated in the motion and affidavit are believed by him to be true, and that said motion should be permitted to be filed and recorded among the papers in this cause, and disposed of as provided by the statute.

In the preparation and filing of the motion and affidavit and in the presentation of this motion, defendant does not mean or intend any disrespect whatsoever to this Honorable Court, but is attempting merely to be granted the rights and privileges accorded him under the Constitution and laws of the United States.

Therefore, this defendant, who files this motion personally and in his own behalf, respectfully asks this Court to order the Clerk to allow the above motion

and affidavit to be filed as of the date the same was presented for filing, to wit: June 20th, 1940, and further asks this Court to hear said motion and affidavit and dispose of the same in accordance with law, before this defendant is required to enter his plea to the indictment in any of the above cases.

Respectfully submitted to this Honorable Court, in open Court, this the 28th day of June, A. D. 1940, the date set for arraignment in the above cause, and before this defendant has entered his plea to the indictment.

CHARLIE BELAND

Defendant, and Attorney in his own behalf

(Seal)

THE STATE OF TEXAS }
COUNTY OF TARRANT }

Before me, the undersigned authority, on this day personally appeared CHARLEY BELAND, Defendant in the above entitled and numbered cause, who being by me personally and duly sworn, upon his oath states: That he has read the above and foregoing instrument, and that the matters and facts stated therein are true and correct.

CHARLIE BELAND

Charley Beland, Defendant.

SUBSCRIBED and sworn to before me, a Notary Public, in and for Tarrant County, Texas, this the 28th day of June, A. D. 1940.

(Seal)

CLIFFORD MAYS
Notary Public in and for Tarrant County, Texas.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

I, GEO. W. PARKER, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Affidavit of Personal Prejudice and Bias, presented for filing June 20, 1940, but not filed because it is not certified to by a lawyer, and of the Motion for Leave to file the affidavit of prejudice and bias, presented in open court on June 28, 1940, but not filed upon instruction of the Court, in Cause No. 7486, The United States of America versus Louis Sherman, et al.

Witness my hand, and the seal of said Court, at Fort Worth, Texas, this 10th day of January, 1941.

GEO. W. PARKER, Clerk,
By: Rive J. McGrew
Deputy.

(Seal)

TRANSCRIPT OF PROCEEDINGS.

Filed January 9, 1941.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

UNITED STATES OF AMERICA
VS.
B. H. SHAEFFER, ET AL

UNITED STATES OF AMERICA
VS.
PHIL CHADWICK, ET AL

UNITED STATES OF AMERICA
VS.
LOUIS SHERMAN, ET AL

Nos. 7484, 7485 and 7486

At Fort Worth, Texas, on June 28, 1940, on setting for hearing of motions in the above cases, the following proceedings were had on motion attempted to be filed by Charles Beland, one of the defendants, before Judge T. Whitfield Davidson:

THE COURT: Is there any other motion?

MR. FONVILLE: Mr. Beland has a motion here. There is no motion before the Court. The motion is to disbar this Judge. That motion, under the law, must be accompanied by a certificate of record, of which there is none here, that it is filed in good faith. No such certificate of counsel appears on the motion

and it has been refused by the Clerk because it does not comply with the law.

THE COURT: Let me look at the motion. (Motion is presented to the Court.)

THE COURT: On the motion before the Court there is an affidavit filed similar to one filed two years ago, and the lawyer that certified to that apologized in open court and retracted it. If there is any other lawyer that wants to certify to it, the Court will give him permission.

MR. SMITH: I would like the record to show I am not representing Mr. Beland on that motion.

MR. FONVILLE: I don't understand double representation. I am sure Mr. Smith didn't have anything to do with the motion, but if he has a lawyer, he has a lawyer for all purposes.

THE COURT: The Court understands Mr. Smith does not appear on this motion and will permit him to decline to appear.

MR. SMITH: However, your Honor, Mr. Beland asked me to ask the Court if he can be heard on the motion.

THE COURT: Tell him he will have to be heard under oath. If you wish to protect your client, it might be your duty to talk to him before he swears.

(Court recessed.)

THE COURT: Does your client desire to proceed?

MR. SMITH: After advising with him, he states

he has some other motion he desires to file, and is going to file that.

THE COURT: The motion is not due any consideration of the Court until it has been certified to by a lawyer as having been filed in good faith. The reason for that is very manifest, because it is a very valuable right to be preserved to defendants where the Court is biased against them, but it was never intended by the law for defendants to use it merely to get a postponement of his case, merely to file it for frivolous matters. In this particular case, the Court doesn't know the defendant and if he ever saw him before this minute he doesn't recall it. Since the defendant doesn't know the Court and the Court doesn't know the defendant, he can't understand how there can be any bias or prejudice existing toward him more than any other person. Whenever an affidavit is filed that is a complete fabrication, and is false from beginning to end, and a man insists upon filing it, he should have the privilege of being heard in Court and be heard before a grand jury, and if he desires to now present that, he may take the witness stand.

MR. BELAND: May I be heard your honor?

THE COURT: Come around.

The witness, CHARLES BELAND, having been first duly sworn, testified as follows:

THE COURT: I think perhaps you ought to have a guardian to save yourself from walking deliberately into making a false swearing in court.

A. Well, your Honor, I will solemnly swear that

every one of these words of this affidavit to be the truth, as far as I know and believe.

THE COURT: I will ask the District Attorney to give the witness now warning how his testimony may be used hereafter, against him.

MR. FONVILLE: Charles Beland, you understand that you are now on trial in the case now before the Court?

A. I do.

Q. Do you understand that you have a constitutional right not to be required to be a witness against yourself?

A. Absolutely.

Q. Do you understand, however, that you may, if you desire, testify at your own request, waiving your constitutional right?

A. That's right.

Q. Do you wish to testify?

A. I do.

Q. Do you request the Court to permit you to testify?

A. I do.

Q. Under oath?

A. Under oath.

Q. You understand that anything you may testify under oath concerning this or any other matter about

which inquiry may be directed to you may be used against you?

A. I do.

Q. Do you also understand, Mr. Beland, that there is a statute against false swearing in the United States District Court under oath?

A. I do.

Q. And that if you commit the crime, that is, if you do swear falsely under oath in this court, you may be taken into custody on a warrant?

A. I do.

MR. SMITH: May it please your Honor, in order to keep the record straight, Mr. Beland didn't tell me he wanted to testify. What he said was, to file some motion.

THE COURT: You might let it show that you do or do not appear for him.

MR. SMITH: No, sir, I don't appear for him at all. I am just telling the Court of my conference with him at recess.

THE COURT: Mr. District Attorney, I will ask you to file, to dictate to the reporter, some contest on this. I don't think it should be heard, or is entitled to be heard, until some lawyer certifies to it, and not having been certified to by any lawyer, and he having a lawyer who does not certify to it, the Court will dismiss the affidavit as the matter now stands.

MR. BELAND: Your Honor, can I take exception to the Court's ruling?

THE COURT: You certainly may.

MR. HOOD: Your Honor, is it permissible for the government to ask Mr. Beland one or two questions?

THE COURT: The Court, either at this time or at some other time desires him interrogated about who prepared the papers.

MR. HOOD: On the face of it, it is a false affidavit. I think Mr. Beland should be taken into custody now for filing a false swearing.

THE COURT: The Court will give proper instructions at the end of the trial. The Court doesn't want him prejudiced.

MR. HOOD: He knows Ardell Savage testified she didn't know what this was.

MR. BELAND: I didn't know anything of the kind.

MR. HOOD: And he knows Alex Mood apologized for it.

MR. BELAND: I haven't conferred with Alex Mood.

THE COURT: May the Court interrogate you briefly? This paper that you attempted to file, but which under the law was not subject to be filed, shows that a lawyer has prepared it and a lawyer made it out. What lawyer prepared this for you?

A. If I am going to later be charged with false

swearing, I am going to refuse to testify, on the ground I might be incriminated.

I, Maidee Hoppee, shorthand reporter, certify that the above and foregoing is a true and correct transcript of the proceedings on the aforementioned motion.

MAIDEE HOPPE
Reporter.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

I, GEO. W. PARKER, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Transcript of Proceedings had on motion attempted to be filed by Charles Beland on June 28, 1940, the original of which was filed on January 9, 1941, in cause No. 7486, The United States of America versus Louis Sherman, et al, and now remains on file and of record in my office at Fort Worth, Texas.

Witness my hand, and the seal of said Court, at Fort Worth, Texas, this 10th day of January, 1941.

GEO. W. PARKER, Clerk,
By: Rive J. McGrew
Deputy

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 959

PHIL CHADWICK, MRS. PHIL CHADWICK, ABE CHAPMAN AND CHARLEY SCHIFFMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 966

CHARLES BELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals in No. 959 (R. 931–936) is reported in 117 F. (2d) 902, and its opinion in No. 966 (R. 1043–1047) is reported in 117 F. (2d) 958.[1]

[1] Two separate appeals were taken, one by the four petitioners in No. 959 and the other by petitioner Beland and a co-defendant, the judgment of conviction being reversed as

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 959 was entered February 18, 1941, and its judgment in No. 966 was entered February 27, 1941 (R. 937, 1048). Petitions for rehearing in each case were denied March 20, 1941 (R. 946, 1058). The petition for a writ of certiorari in No. 959 was filed April 17, 1941 and the petition in No. 966 was filed April 18, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a misjoinder of persons and offenses in the indictment and proof; whether the proof showed several smaller conspiracies in variance to the one general conspiracy charged in the indictment; and whether there was sufficient evidence to support the conviction of petitioner Beland on the conspiracy count.

2. Whether reversible error resulted from the admission of testimony showing that the conspiracy

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to the latter (R. 1048). The appeals were argued separately and the Circuit Court of Appeals rendered two opinions. Both cases are accordingly in this Court on the same District Court record, although a copy thereof is on file in both No. 959 and 966. Each record, however, contains only the Circuit Court of Appeals proceedings in that particular case.

was planned in a penitentiary, that one of the defendants harbored a fugitive co-defendant and adulterated narcotics with poisonous chemicals, and from the prosecutor's summation to the jury.

3. Whether, in the absence of a request, it was error to charge the jury that no inference should be drawn from the failure of any defendant to testify, and whether the charge adequately explained the requisite elements of the conspiracy.

4. Whether the verdict is vague and unintelligible because it enumerates only the counts upon which petitioners were found guilty, and whether two of the petitioners were properly sentenced on Count 42 when the verdict found them guilty on "Counts 7 to 42."

5. Whether an incriminating letter was improperly admitted in evidence because of a proceeding alleged to be pending in some other court on a motion to suppress the evidence.

6. Whether the trial court erred in refusing to recuse himself upon the filing of an affidavit of prejudice which was not certified by affiant's counsel of record as being made in good faith.

STATEMENT

On May 14, 1940, an indictment containing forty-two counts was returned against petitioners and others in the District Court for the Northern District of Texas (R. 2–36). Thirty-four counts [2]

[2] Nos. 1 through 12, 14, 15, 17, 18, 20, 21, 23, 24, 26 through 39.

charged petitioners with transporting and concealing quantities of heroin, knowing the same to have been imported contrary to law, in violation of U. S. C., Title 21, Sec. 124; five other counts [3] charged petitioners with selling, etc., heroin which was not in or from the original stamped package containing such heroin, in violation of U. S. C., Supp. V, Title 26, Sec. 2553 (a); two counts [4] charged petitioners with selling, etc., heroin not in pursuance of a written order of the purchaser, in violation of U. S. C., Supp. V, Title 26, Sec. 2554 (a); and the remaining count, No. 42, charged a conspiracy to violate each of the above sections.

Chadwick and Mrs. Chadwick were convicted on Counts 7 to 42; Schiffman and Chapman were convicted on Counts 1 to 6, inclusive, and 42; and Beland was convicted on Counts 16, 18 and 42 (R. 38–39). The following sentences were imposed: Chadwick, a general sentence of twelve years' imprisonment (R. 82); Mrs. Chadwick, two years' imprisonment on Count 42 and a general sentence of five years' imprisonment on Counts 7 to 41, inclusive, execution of the latter to be suspended and petitioner placed on probation for five years beginning at the expiration of the two-year sentence (R. 84); Schiffman, a gen-

[3] Nos. 13, 16, 19, 22, 25.
[4] Nos. 40, 41.

eral sentence of ten years' imprisonment (R. 87); Chapman, a general sentence of eight years' imprisonment on Counts 1 to 6, inclusive, and two years' imprisonment on Count 42, execution of the latter to be suspended and petitioner placed on probation for five years beginning at the expiration of the general sentence (R. 85); and Beland, a general sentence of five years' imprisonment on Counts 16 and 42 and ten years' imprisonment on Count 18, execution of the latter to be suspended and petitioner placed on probation for a period of five years beginning at the expiration of the five-year sentence (R. 80).[5]

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgments of conviction were unanimously affirmed with respect to all petitioners, except Beland (R. 937, 1048). As to him, the judgment of conviction was affirmed on Count 42, the conspiracy count, but was reversed as to Counts 16 and 18, the substantive counts, the Circuit Court of Appeals ordering that he be resentenced accordingly.[6]

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[5] The judgments as to Mrs. Chadwick (R. 84) and Beland (R. 80–81) do not show the suspension of execution of part of their sentences and the grant of probation. Since, however, their notices of appeal (R. 88, 91) and their petitions for writs of certiorari (Chadwick Pet. 5, Beland Pet. 4–5) show such suspension and probation, we assume that the trial judge must have granted the same by orders, separate from the judgments, which were not included in the record.

[6] Imposition of a new sentence is, of course, necessary since the general sentence of five years' imprisonment imposed on

The proof showed the existence of a large narcotic ring having headquarters in New York and Chicago, from which points its operations extended through the South, Southwest, and Middle West. The conspiracy charged had its inception in Leavenworth, Kansas, when Schiffman, Chapman, and another defendant, Sherman, met the codefendants Goldberg, Ross, and Cox, and arranged with the latter to meet them subsequently. Goldberg was told to meet Schiffman in New York when he was released from the penitentiary, and Ross and Cox were to meet Chapman in Texas. Goldberg went to New York and met Schiffman; Ross and Cox went to Fort Worth and Dallas, respectively, and communicated with Chapman, and thereafter all dealt actively in narcotics (R. 107–114, 139–145, 289–292).

Goldberg worked for Schiffman in New York for about three months in the spring of 1938, "cutting" or adulterating from twenty-five to fifty ounces of heroin per week (R. 113–116). Schiffman obtained the narcotics from defendant Cooper (R. 381–382, 394), and introduced Chadwick to Goldberg as his, Schiffman's, partner, who would take care of the drug business while he was out of town (R. 113–115). Schiffman made trips to Chicago, was introduced in that city as the defendant Stobble's part-

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Counts 16 and 42 is in excess of the maximum under the conspiracy statute, on which Count 42 was predicated (U. S. C., Title 18, Sec. 88).

ner, and on one occasion was there with Chadwick (R. 415–420, 426). In Texas contact was made between Chapman, Ross, and Cox in the fall of 1937, Chapman furnishing the two others with heroin on credit (R. 140–144, 291–292). In November 1937, Schiffman was in Texas and accompanied Chapman to Cox's home where he informed the latter that Chapman was working for him and he, Schiffman, would stand back of Chapman's "stuff" (R. 299). Chapman also operated in Chicago; both Ross and Cox went there, met Chapman, and obtained drugs from him (R. 146–149, 295–296). Chapman gave each of them half of a dollar bill to be used as identification by presenting it to the holder of the other half (R. 146–150, 293–294), and told Ross that "they" moved from place to place (R. 293). After Chapman's arrest, Ross went to New York and acquired heroin from defendants Cooper and Weiss, using his half of the bill to identify himself (R. 151–156, 160–162).

When Ross was in New York, Cooper told him that "there would be somebody down [to Texas] in a short time to see [him]," and after Ross returned to Texas, Schiffman made several trips there, in the summer of 1938, delivering narcotics to Ross and Cox and collecting money from them (R. 160–163, 301). In August or September 1938, Chadwick called Ross in Fort Worth and said that "he had been sent down by the boys from New York" and would supply him with whatever "stuff" he needed

(R. 164); and shortly thereafter Schiffman went to Cox's home in Dallas with Chadwick, stating that the latter was taking over his business and that he would stand behind him. Thereafter, Cox acquired narcotics from Chadwick (R. 302–305). Chadwick also supplied Ross with drugs which he sold and paid for from the proceeds (R. 164–169, 223–225). Ross also paid money to Chadwick, which, together with money furnished by other defendants, was used to bribe a narcotic agent for protection (R. 169–176, 310–330). Heroin was "cut" by Chadwick, Mrs. Chadwick, and Ross on Chadwick's premises and was distributed therefrom, and on one occasion Mrs. Chadwick made an airplane trip to New York and brought back drugs (R. 179–189, 249–251, 305–306). She also accompanied her husband on one occasion when he delivered heroin to Mrs. Ross (R. 254–255).

Beland was seen in the company of Chadwick in Fort Worth (R. 718–719), Ross "thought" he saw him at Chadwick's home (R. 306), and there was testimony that Beland "cut" heroin at Chadwick's place (R. 261–262). Ross contacted Beland, asked him to suggest names of purchasers of heroin, and Beland gave him two names, Mr. and Mrs. Blakely. After telling Beland that he was going to New York to get some "stuff" (R. 193–194), Ross contacted the Blakelys, told them that Beland had sent him, and arranged to sell narcotics to them. Ross then made another trip to New York, purchased heroin

from Schiffman, and on his return made sales to the Blakelys (R. 194–200, 493–501). At about this time the Blakelys had written to Beland in regard to buying heroin and had been informed by him that it was selling for $25 an ounce (R. 492–493), and they went to his home and were given shots of heroin (R. 487, 494–497). From the Blakelys, Ross learned of a person in Houston who had a "kilo" (37 ounces) of heroin for sale. He informed Beland thereof, and the latter agreed to finance the deal if Ross would buy it (R. 201–202, 502). When Ross first communicated with Chapman in Fort Worth, Chapman said that he would call Ross the following day as "he was going out to Charlie Beland's" (R. 141). In December 1938, defendant Cooper was arrested in New York and his books were seized (R. 620–622). They contained the names and addresses of many of those involved in this case (R. 625–633), including Beland (R. 627).

ARGUMENT

I

All petitioners, except Beland, contend (1) that there was a misjoinder of persons and offenses in that the indictment charged and the proof showed the commission of a series of unrelated and independent crimes by different defendants; and (2) that there was a fatal variance in that the proof showed several conspiracies instead of the one charged (Chadwick Pet. 24–32); and Be-

land contends (3) that the evidence was insufficient to support his conviction (Beland Br. 19–22). We submit that there is no merit to any of these contentions.[7]

1. The indictment charged all defendants with various substantive offenses against the narcotic laws, and with conspiracy to violate such laws. U. S. C., Title 18, Sec. 557, specifically authorizes the joinder of such counts. There was, therefore, no misjoinder.

2. Petitioners do not deny that the record contains overwhelming evidence that Chadwick, Schiffman, and Chapman are guilty of the substantive counts of which they were convicted.[8]

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[7] The contention that reversible error resulted from the court's failure to order that petitioners be given a bill of particulars (Chadwick Pet. 23–24) requires but little comment. Schiffman and Chapman did not request a bill of particulars, and Chadwick and Mrs. Chadwick merely filed with the United States Attorney a request to be informed "upon what theory" they would be connected with the substantive counts (R. 68). This request, not even addressed to the court, was hardly sufficient to enable anyone to tell what information petitioners desired, but in any event the record shows that it was "overruled in part and sustained in part" (R. 78) without showing anything further. In this state of the record it is too apparent for argument that petitioners may not assert that the trial court abused its discretion.

[8] The Circuit Court of Appeals stated (R. 934) that "the record is replete with uncontradicted evidence which establishes that each of them had a part in the conspiracy, and that they were guilty on the substantive counts of which they stand convicted."

Since the sentences imposed did not exceed that which might properly have been imposed upon them under the substantive counts, it is, as to them, immaterial whether there was a variance between the conspiracy count and the proof (*Evans* v. *United States,* 153, U. S. 608; *Abrams* v. *United States,* 250 U. S. 616, 619; *Claasen* v. *United States,* 142 U. S. 140). Moreover, it is apparent from the statement of facts (*supra,* pp. 6–9 that the Government proved a single general conspiracy to distribute narcotics in which all the petitioners were active and were directly connected with each other, as well as with other conspirators. See *United States* v. *Bruno,* 105 F. (2d) 921 (C. C. A. 2d), reversed on other grounds, 308 U. S. 287. And Mrs. Chadwick was adequately linked to the conspiracy by the testimony that narcotics were "cut" on and distributed from the Chadwick residence, that she assisted in the "cutting," and that she transported narcotics from New York to her residence in Texas.

3. There was ample evidence from which the jury might have inferred that Beland was a member of the conspiracy. He was seen in Chadwick's company; he "cut" heroin on the Chadwick premises; he furnished heroin to addicts; he was closely tied in with coconspirator Ross, giving him names of prospective customers and agreeing to finance him in a proposed purchase of heroin; and his name appeared in the books of coconspirator Cooper in New York. These significant circum-

stances, unexplained by petitioner, clearly warranted the verdict of guilty on the conspiracy count (cf. *United States* v. *Manton,* 107 F. (2d) 834 (C. C. A. 2d), certiorari denied, 309 U. S. 664). The conclusion of the Circuit Court of Appeals that there was substantial evidence of Beland's guilt (R. 1044) followed the like conclusion of the District Court and the verdict of the jury. In the light of this unanimity we submit that he has made no such showing as would require this Court to reexamine the evidence. Cf. *Delaney* v. *United States,* 263 U. S. 586, 590.

II

All petitioners, except Beland, urge that they were prejudiced by the admission of testimony showing that the conspiracy was planned in a penitentiary, that Chadwick had harbored Ross while he was a fugitive and adulterated heroin with poisonous chemicals, and by the prosecutor's summation to the jury (Chadwick Pet. 32–42). However, it is clear that none of these matters affected petitioners' substantial rights.

1. Aaron Goldberg, named in the indictment as a coconspirator, but not as a defendant (R. 25), testified for the Government and stated that during 1937, while he was serving a sentence in the Leavenworth penitentiary, he there met petitioner Schiffman and the defendant Sherman (R. 106–111). The defendant Cox, who also testified for the Government, stated that he saw and conversed

with petitioner Chapman at Leavenworth, Kansas, in 1936 (R. 289–290). Petitioners urge (Pet. 33–34) that this was an attempt by the Government to prove that they were confined in the penitentiary, and was improper because they had not taken the stand and put their reputations in issue. The testimony was offered only for the purpose of showing where the witnesses' conversations took place and not to put in issue the reputations of Schiffman and Chapman (see R. 107, 290).[9] Moreover, in both instances, at petitioners' request, the trial court instructed the jury that there was no evidence that any defendant was in the penitentiary and to disregard any impression to that effect (R. 108, 290). These admonitions accorded whatever protection the petitioners could ask against improper inferences from the evidence in question.

2. There was no error in admitting testimony of Ross, a codefendant who testified for the Government, that Chadwick counseled him and his wife to become fugitives from a prior narcotic case pending against them and harbored them at his farm (R. 175–185), and that heroin which he purchased from Chadwick had been adulterated with poisonous chemicals (R. 225–226). Both incidents were part of the conspiracy. The indict-

[9] Both witnesses were testifying to the inception of the conspiracy. It can hardly be said that the mere fact that a conspiracy is hatched in a prison prevents the Government from proving its origin.

ment from which Ross fled was returned because of sales by him to one Beulah Franks of heroin obtained from Chadwick (R. 173–175), those sales being also charged as offenses in Counts 13–27, and as overt acts in Count 42 of the present indictment (R. 9–17, 32–33). Moreover, the harboring obviously furthered the conspiracy since it was actively continued during the time when Ross was harbored by Chadwick (R. 181–184). And as one of the objects of the conspiracy was to "cut" or adulterate the heroin disposed of by the conspirators (R. 111–112, 225–226), it could hardly have been error to admit evidence that heroin which Chadwick "cut" and disposed of to the co-conspirator Ross was poisonous.[10]

3. Petitioners contend that the summation of the prosecutor entitles them to a new trial (Chadwick Pet. 35–38, Beland Br. 22–24). The court struck from the record and instructed the jury to disregard (R. 857) the prosecutor's remark about keeping a government witness under guard to protect him from the defendants. Moreover, the remark was apparently made in response to argument of defense counsel (see Chadwick Pet. 37). Since

[10] Obviously petitioners were not prejudiced by the redirect testimony of narcotic officer Bell (Chadwick Pet. 35). Not only had the purport of this testimony been previously elicited by the defense on Bell's cross-examination (R. 612), but the court first limited the testimony to the codefendant Green (R. 614) and then at the government's suggestion withdrew the particular statement entirely and instructed the jury not to consider it "for any purpose" (R. 615).

petitioners have not included the defense argument in the bill of exceptions (see R. 859), they are in no position to urge that the prosecutor's statement was prejudicial. *Vause* v. *United States,* 53 F. (2d) 346, 354 (C. C. A. 2nd), certiorari denied, 284 U. S. 661; *Murphy* v. *United States,* 39 F. (2d) 412, 414 (C. C. A. 8th). Petitioners also urge that statements in the summation that the Government's evidence was uncontradicted (Chadwick Pet. 35–36, R. 856) constituted an implied comment on the failure of defendants to testify. But the petitioners do not argue that the situation was such that the contradiction could come only from the defendants themselves.[11] In the light of the evidence and the trial court's charge (see p. 16, *infra*) we think it plain that the summation did not infringe the petitioners' substantial rights.

III

All petitioners, except Beland, contend that two of the instructions to the jury constitute reversible error (Chadwick Pet. 42–45).

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[11] See *Rinella* v. *United States*, 60 F. (2d) 216, 218 (C. C. A. 7th); *Hood* v. *United States*, 59 F. (2d) 153, 155 (C. C. A. 10th); *Jamail* v. *United States*, 55 F. (2d) 216, 217 (C. C. A. 5th); *Slakoff* v. *United States*, 8 F. (2d) 9 (C. C. A. 3rd); *Schwartz* v. *United States*, 294 Fed. 528, 529 (C. C. A. 5th); *Lefkowitz* v. *United States*, 273 Fed. 664, 667–668 (C. C. A. 2d), certiorari denied, 257 U. S. 637; *Shea* v. *United States*, 251 Fed. 440, 445 (C. C. A. 6th), certiorari denied, 248 U. S. 581; *Rose* v. *United States*, 227 Fed. 357, 363 (C. C. A. 8th), certiorari denied, 239 U. S. 647; *Carlisle* v. *United States*, 194 Fed. 827, 830 (C. C. A. 4th).

1. Petitioners urge that in the absence of a request by them, it was improper for the court to charge that the jury, in its deliberations, should not consider the failure of any defendant to testify (R. 972–973).[12] However, it is clear the instruction was given for the defendants' protection pursuant to U. S. C., Title 18, Sec. 832. *Kreuzer* v. *United States,* 254 Fed. 34, 38–39 (C. C. A. 8th), certiorari denied, 249 U. S. 603; *Bruno* v. *United States,* 308 U. S. 287, 292, 294. Since one defendant (Schaffer) had testified (R. 894–942), the instruction was obviously given to forestall the natural comparison which the jury might infer from petitioners' silence. *Kahn* v. *United States,* 20 F. (2d) 782 (C. C. A. 6th); *Becher* v. *United States,* 5 F. (2d) 45, 49 (C. C. A. 2nd); *Robilio* v. *United States,* 259 Fed. 101, 102 (C. C. A. 6th); *Kreuzer* v. *United States,* 254 Fed. 34, 38–39 (C. C. A. 8th), certiorari denied, 249 U. S. 603; *Hanish* v. *United States,* 227 Fed. 584, 587 (C. C. A. 7th).

2. The assertion that the trial judge failed to inform the jury that the acts of one conspirator are binding upon the other conspirators only when the evidence first establishes beyond a reasonable doubt that the conspiracy existed and that the acts are in furtherance of the conspiracy (Chadwick Pet.

[12] The pages of the Chadwick record are mis-numbered following p. 956. Our references to record pages following p. 956 (with the exception of the Circuit Court of Appeals proceedings) are accordingly to the Beland record, which has been corrected.

43–44), is contradicted by the record. After charging on "reasonable doubt" and defining the term "conspiracy" (R. 965–966) the court stated that "After such * * * conspiracy has commenced, the declaration of one conspirator may be taken against every other conspirator * * *. Before the conspiracy begins the declarations made by any one of the parties *are not* admissible * * *" (R. 967). The court twice stated that "When a conspiracy exists it is a general rule that *each conspirator* is criminally responsible for the acts of his associates *in the furtherance of the common design* during the existence thereof" (R. 969). (Italics ours.) Moreover, at the conclusion of the charge, the prosecutor stated that "only such declarations made during the existence of the conspiracy may be considered as are in furtherance of the conspiracy," to which the court replied "I think that is in the charge in at least two places. * * * The jury is so instructed" (R. 976).

IV

Petitioners Chadwick, Schiffman, and Chapman contend that the verdict was too vague and indefinite to protect them from a second prosecution for the offenses involved in some of the counts, and in addition, Mrs. Chadwick asserts that her sentence to two years' imprisonment was imposed on a count under which she was not found guilty (Pet. 45–46).

The first contention is predicated upon the fact

that the verdict as to Schiffman and Chapman, though finding them guilty and not guilty under certain counts, did not mention other counts at all; and upon the theory that the verdict finding Chadwick guilty on "Counts 7 to 42" did not include Count 42 and hence was silent as to it (R. 38–39, 978–979). However, it is well settled that the silence of a verdict as to certain counts of an indictment is equivalent to an acquittal on those counts. *Jolly* v. *United States,* 170 U. S. 402, 408; *Selvester* v. *United States,* 170 U. S. 262, 267–269; *Dealy* v. *United States,* 152 U. S. 539, 542. Hence, Schiffman and Chapman may plead the implied acquittal if they should again be prosecuted for any of the offenses involved in the counts not mentioned in the verdict. And as for a possible second prosecution of Chadwick, clearly he could plead prior conviction since the judgment recites that he was convicted under "Counts 7 to 42, inclusive" (R. 82). Again, even assuming *arguendo* that the general sentence of twelve years' imprisonment on "Counts 7 to 42" (R. 82) erroneously included Count 42 when the verdict did not, the sentence is obviously supported by the other counts. See cases cited, *supra,* p. 11.

Mrs. Chadwick's contention rests on the language of the verdict finding her "not guilty as charged in Counts 1 to 6, inclusive * * * (and) guilty in Counts 7 to 42" (R. 979). She argues that the failure to repeat the word "inclusive" negates a finding of guilty on Count 42.

We think it is plainly evident from the language employed that the jury intended to dispose of the entire indictment as to her by acquitting on the first six counts and convicting on all remaining counts, "7 to 42." The word "to" is to be taken exclusively according to the subject matter (*Union Pacific R. R. Co.* v. *Hall,* 91 U. S. 343, 348), and it is incredible that the jury could have intended to acquit petitioner on the conspiracy count after finding her guilty on thirty-five substantive counts. As was said by the Circuit Court of Appeals (R. 935), verdicts are to be reasonably construed. Moreover, petitioner did not bring this objection to the trial court's attention when the verdict was returned or when sentence was imposed, even though the judgment recites that she was convicted on a verdict of guilty under "counts 7 to 42, inclusive" (R. 84). Obviously, she was well aware of the jury's intention to convict her on Count 42. Cf. *O'Connell* v. *United States,* 253 U. S. 142, 148.

V.

Petitioners contend (Pet. 47, 48) that it was error to admit in evidence a letter written by petitioner Chadwick, because a motion to suppress it as having been illegally seized was pending in another United States District Court.

Petitioners do not appear to urge the illegality of the search, but apparently rest their contention solely upon the proposition that the pendency of

suppression proceedings in another court rendered the letter inadmissible. Petitioners furnish neither reason nor authority [13] for this proposition, and we know of none. Furthermore, the courts below were not furnished with information essential to the consideration of such a question.[14]

VI

Petitioner Beland contends that the trial court erred in rejecting his affidavit of bias and prejudice. The affidavit was subscribed by petitioner "In Propria Persona" and was not "accompanied by a certificate of counsel of record that such

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[13] The cases cited by petitioners (Pet. 48) on illegal search and seizure, are irrelevant to the proposition urged and would be inapplicable for obvious factual differences if the question of the illegality of the search and seizure were here raised. The letter involved (Gov't Ex. 70, R. 824) was taken from the possession of petitioner Charles Schiffman (R. 691). The search was made with Schiffman's permission and cooperation (R. 690–692) and therefore was not "unreasonable." *Cantrell* v. *United States*, 15 F. (2d) 953 (C. C. A. 5th). The question of illegal search and seizure, if raised below, came too late in any event. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Adams* v. *New York*, 192 U. S. 585, 594. And as the letter was assertedly written by Chadwick, there was nothing improper in proving his handwriting by usual methods (Pet. 47).

[14] Petitioners furnish no record references (Pet. 47–48). The record fails to disclose that the alleged proceedings were in fact pending, save perhaps by remarks of counsel (R. 821–823). The identity of neither the court nor the parties to the alleged proceedings is disclosed, nor is there available any data as to the status or duration of the alleged proceedings.

affidavit and application are made in good faith," as required by Section 25 of Title 28 U. S. C.[15] (R. 1027–1032).

The clerk of the trial court having refused to file the affidavit because of non-compliance with the statute, petitioner filed a motion requesting the court to permit it to be filed (Beland, Br. 10). Upon hearing of the motion, petitioner's counsel of record declined to certify that the affidavit was made in good faith, stating that he was "not representing Mr. Beland on that motion" (R. 1038). The court then examined the affidavit, indicated that it "is a complete fabrication, and is false from beginning to end," and "dismissed the affidavit" because of the lack of certificate, petitioner "having a lawyer who does not certify to it" (R. 1037–1041).

It is plain that there was no error in rejecting the affidavit. As the court below held, counsel's certificate "is indispensable and affidavits which are not accompanied by the certificate are insufficient

[15] This section created a new right, nonexistent at common law. See *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 987–988 (M. D. Ala.); *Ex parte American Steel Barrel Co.*, 230 U. S. 35, and one frequently recognized as being subject to grave abuse, *Berger* v. *United States*, 255 U. S. 22; *Saunders* v. *Piggly Wiggly Corporation*, 1 F. (2d) 582, 585 (W. D. Tenn.); *Morse* v. *Lewis*, 54 F. (2d) 1027, 1032 (C. C. A. 4th); *Cuddy* v. *Otis*, 33 F. (2d) 577, 578 (C. C. A. 8th). The section failed of passage until the provision requiring counsel's certificate was added by a conference committee (Conference Report Relative to the Revision and Codification of the Laws, Sen. Doc. 848, 61st Cong., 3d Sess.).

and may not be filed" (R. 1046). *Cuddy* v. *Otis,* 33 F. (2d) 577, (C. C. A. 8th); *Benedict* v. *Seiberling,* 17 F. (2d) 831, 838 (N. D. Ohio); *Currin* v. *Nourse,* 74 F. (2d) 273 (C. C. A. 8th), certiorari denied, 294 U. S. 729; *Ex parte N. K. Fairbank Co., supra,* at p. 985; *Morse* v. *Lewis,* 54 F. (2d) 1027, 1032 (C. C. A. 4th); *Newman* v. *Zerbst,* 83 F. (2d) 973, 974 (C. C. A. 10th); *Berger* v. *United States,* 255 U. S. 22, 23. The court's further holding that the trial judge properly determined the legal sufficiency of the affidavit,[16] is equally correct. *Berger* v. *United States, supra,* at pp. 32, 36; *Henry* v. *Speer,* 201 Fed. 869, 872 (C. C. A. 5th); *Simmons* v. *United States,* 89 F. (2d) 591 (C. C. A. 5th). Petitioner's contention that because of his lawyer's refusal to certify as to his good faith he was without counsel for the purposes of his affidavit (Pet. 8, Br. 10, 14) is absurd. The record shows that he was represented by counsel of record throughout the proceedings (R. 37, 41), and as the Circuit Court of Appeals said, he cannot "shuttle his coun-

[16] Being clearly insufficient on its face, the question of the sufficiency of the affidavit on its merits did not and does not now arise. The affidavit and motion and a transcript of the proceedings with reference to its filing are set out in full in the Appendix to petitioner's brief in support of his petition for certiorari and appear at 1027–1042 in the record. It seems quite clear, however, as the Circuit Court determined (R. 1046–1047) that it was insufficient. It set forth no matter showing *personal* bias or prejudice. *Henry* v. *Speer, supra; Ex parte N. K. Fairbank Co., supra; Parker* v. *New England Oil Corp.,* 13 F. (2d) 497 (D. Mass.).

sel in and out of the case in order to circumvent the statute" (R. 1046).

CONCLUSION

The decision below is clearly correct, and there is neither conflict of decisions nor any question of general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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